United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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P/S

76-4044

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-4044

BOC INTERNATIONAL LIMITED, f/k/a The British Oxygen Company Limited, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, and BRITISH OXYGEN INVESTMENTS, LIMITED,
Petitioners,

—against—

FEDERAL TRADE COMMISSION,
Respondent.

No. 76-4045

AIRCO, INC.,
Petitioner,

—against—

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX, VOLUME 3
PAGES A912 TO A1562
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Volume 10—In Camera Filings*

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BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER

of

BRITISH OXYGEN COMPANY, LIMITED
BOC FINANCIAL CORPORATION
BOC HOLDINGS, LIMITED
BRITISH OXYGEN INVESTMENTS, LIMITED
AIRCO, INCORPORATED

Docket No. 8955

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Room 532, FTC Building,
Sixth and Pennsylvania
Avenue, N. W.,
Washington, D. C.

Tuesday, March 12, 1974.

Met, pursuant to notice at 11:00 a.m.

BEFORE:

ERNEST G. BARNES, Administrative Law Judge.

APPEARANCES:

GEORGE L. WADE, Esq., W. FOSTER WOLLEN, Esq. R. BRUCE MAC WHORTER, Esq., and DANFORTH NEWCOMB, Esq., Shearman & Sterling, 53 Wall Street, New York, N. Y., 10005, on behalf of AIRCO, INC.

GORDON [illegible], Esq., DONALD E. PURCELL, Esq., DARYL A. NICKEL, Esq., RHETT R. KRULLA, Esq., JOHN R. HOAGLAND, Esq., and ROBERT E. LIEDQUIST, Esq., on behalf of the Federal Trade Commission.

JAY H. TOPKIS, Esq., and LEWIS KAPLAN, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, N. Y. 10022, on behalf of Respondents.

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P R O C E E D I N G S

JUDGE BARNES: Are we ready to proceed?

ALL COUNSEL: Yes, your Honor.

JUDGE BARNES: This is a prehearing conference in the matter of British Oxygen, Limited, et al., Docket Number 8955, being held pursuant to my order of March the 5th, 1974.

First of all, the Commission's ruling provided that this will be a non-public hearing unless we further agree otherwise. Do we have any thoughts about making it a public or a non-public hearing?

MR. TOPKIS: It makes no difference to us, your Honor. We have no objection.

MR. WADE: We have no objection one way or the other.

JUDGE BARNES: Mr. Youngwood?

MR. YOUNGWOOD: It makes no difference to me.

JUDGE BARNES: Let's make it a public hearing. We have some other people here, I presume, that are the Commission's people. I'm not sure anyway that this will be a public prehearing conference.

The purpose of our meeting today is to find out where we stand on getting this matter to trial. I understand the Respondents are interested in a speedy trial. So is the Complaint Counsel. With that in mind also I understand that there is a preliminary injunction in effect entered in the United States District Court for the District of Delaware on March the 8th, 1974. I have been provided a copy of the Court's order by client's Counsel this morning.

MR. TOPKIS: I should perhaps caution your Honor that I understand Chief Judge Latchum amended that order yesterday in a clarifying fashion. I don't think we have a copy with us as yet, but we will supply it to your Honor as soon as we have it.

JUDGE BARNES: Thank you.

Are you Mr. Topkis?

MR. TOPKIS: I'm sorry. Permit me to apologize. My name is Jay H. Topkis. My firm is Paul, Weiss, Rifkind, Wharton & Garrison, and we are from New York City. And we have appeared before your Honor on behalf of British Oxygen Company concerns.

I will share the responsibility with my colleague, Lewis Kaplan, who is to my left, and I will leave Mr. Wade to the other introductions.

MR. WADE: My name is George L. Wade, and my firm is Shearman and Sterling in New York City, and we represent AIRCO, Inc. And with me are my partners, Mr. Bruce MacWhirter and Foster Wollen and Danforth Newcomb.

JUDGE BARNES: Mr. Youngwood, are there any amendments to the complaint which you would like to propose or discuss here this morning?

MR. YOUNGWOOD: No, your Honor.

JUDGE BARNES: All right. I have a few questions I would like to ask with respect to the complainant.

First, is there any problem with the definitions, either set for in the complaint, industrial gases, inhalations, and anesthetic equipment, welding equipment, medical pipeline systems, and anesthetic therapy equipment? Do we understand what is meant by those terms?

Does Respondent have any problems with the definitions?

MR. TOPKIS: Well, I think we do, your Honor, in terms of the clarity. But I think that that will be a problem that will have to come out through the testimony of witnesses rather than -- or perhaps by the attempted stipulation which we will be delighted to discuss with Complaint Counsel.

But I don't think that we are prepared right now to meaningfully discuss the subject.

I may say, your Honor, that we have our answers and copies that were placed in the mail, but recognizing that the mails have a way of being a little slower than they might be, might I had out a copy to your Honor?

JUDGE BARNES: Thank you very much.

MR. TOPKIS: Right. And I have supplied Mr. Youngwood with a copy. They will be available in bulk in the very near future.

MR. WADE: We also have similar definitional problems and are in about the same position ourselves. I don't think that those problems should limit us from being informed and I think the testimony of witnesses will adequately state what types of products we are talking about in all four areas. We have not yet filed our answer or notice of appearance, but we will do so immediately after the hearing downstairs.

I have for your Honor a copy of those two documents. And I am handing one to Mr. Youngwood.

MR. YOUNGWOOD: Thank you.

JUDGE BARNES: This morning Complaint Counsel served me with a copy of a proposed pre-trial schedule. Was this made available to Respondents?

MR. TOPKIS: Yes, it has, your Honor.

JUDGE BARNES: Mr. Youngwood, I have a question about the complaint on page 8. In the lead-in paragraph of paragraph number 27 you say that the effect of agreements by which AIRCO and BOC undertood to eliminate the potential and actual competition between. I want to go back to earlier when you say that the subject of the acquisition may be to create a monopoly by or to lessen competition in the manufacture and distribution sale of industrial gases, inhalation anesthetic equipment, inhalation therapy equipment, and medical gas pipeline systems.

And then if you can, over on the top of page 8 under subparagraph f you speak of the electrical welding and gas welding and cutting markets. Is that a new submarket? This is the first time this has been introduced in the complaint.

MR. YOUNGWOOD: Yes, your Honor. We are stating that the effect of the acquisition of AIRCO stock is such that by acquiring a large industrial gas producer with a full line of electrical welding and gas welding and cutting equipment that BOC has eliminated itself as a potential interested in electrical welding and gas welding and cutting markets and that is it is the acquisition of industrial gas company itself of the industrial gas division which has caused this particular effect to come into being.

JUDGE BARNES: Still, the effect may lessen the competition in the manufacture of and the sale and distribution of electrical welding and gas welding equipment.

MR. YOUNGWOOD: Your Honor, by the acquisition of a large industrial gas company with a full line of welding equipment, as is stated, the effect would be to lessen competition in these fields, yes, sir.

JUDGE BARNES: Anyone else have any complaints or comments?

MR. TOPKIS: I could comment on this, your Honor, but I must confess I am very much perplexed. We had noticed the ambiquity in the complaint to which your Honor has just drawn attention and we thought it had been clarified by us. We have been in litigation in the District Court in Wilmington, Delaware. And the Court there was very precise in its questioning of Counsel for the Commission as to what markets they contended were affected.

And they spoke all the time of four markets: inhalation equpment, anesthetic equipment, inhalation therapy equipment -- I'm sorry, anesthetic inhalation equipment, industrial gases, and medical pipeline systems.

There was nothing said in the entire two days of argument in Wilmington about the subject of legal welding equipment and gas welding and cutting equipment. And I suppose Commission Counsel have the right to make any allegations that they want. But I think we ought to know precisely what their contentions are. I would like to know what we are talking about, five alleged markets or five lines of products. And if so, how?

JUDGE BARNES: That was basically what my question was.

MR. YOUNGWOOD: We are concerned with four markets. However, the effects of the acquisition of a large industrial gas company might have been many. One of the effects of acquisition of AIRCO's industrial gas division is to lessen the likelihood of BOC coming into the United States with a b7 welding line, with legal welding equipment, or with gas welding and cutting equipment.

We have no intention of proving a market or proving acquisition with respect to electrical welding and gas welding and cutting equipment itself. We do have the intention of proving that an effect of the acquisition of AIRCO's industrial gas division, of the acquisition of stock of AIRCO, thereby the acquisition of the stock of the Industrial Gas Division, that effect that that particular acquisition would be to lessen the likelihood that they would also come into welding equipment.

But we do not have the intention of proving a violation in the markets of legal welding and gas welding and cutting equipment.

JUDGE BARNES: Do you intend to place into evidence market shares and sales figures relating to the welding and cutting markets?

MR. YOUNGWOOD: We will introduce into evidence materials which will show that the markets are concentrated. We will introduce into evidence materials we believe will show that BOC might very well have come into the United States in the fields of electrical welding and gas welding equipment, or gas welding and cutting equipment had they not acquired a company with industrial gas divisions as large as AIRCO and instead had they acquired a company that did eb8

not have a full line of welding equipment or had they come in to know them.

MR. TOPKIS: Now, your Honor, I must confess I am at a loss. Mr. Youngwood says that they do not have any intention of proving a violation. I suppose he mentions Section 7 in connection with welding and cutting, but on the other hand, he is going to prove the markets and market shares as the welding and cutting. And he is going to prove that but for this acquisition, we would have come into those markets.

If he is not out to prove a violation, what are we going to waste our time for? I repeat, I have no objection to his setting out to prove anything he wants to. We are, I feel, at the most preliminary stage here. But I hope we are going to go licketysplit and I would hope we are going to concentrate.

JUDGE BARNES: It seems to me, Mr. Youngwood, you will have to prove the violation of Section 7, will you not?

MR. YOUNGWOOD: Your Honor, we have intentions of proving only four markets. We believe that it is an effect of the acquisition of stock of AIRCO with respect to its industrial gases. But with respect to the industrial gas market, that is an effect of that particular violation, the particular acquisition that there might be elimination of competition in the welding area.

However, this is merely an effect of-- I agree that this is the type of evidence which we might concern ourselves with at trial, but it is our intention of proving only four markets.

I'm sorry if the language was such that Mr. Topkis had some difficulty in understanding it. We do intend, though, to prove only four markets.

MR. WADE: If he intends to prove only four markets, then we really don't understand how he can have an effect or a violation or whatever he wants to call it in a fifth market. And we are going to ask, as Mr. Topkis did, if we may go licketysplit to try to expedite this hearing.

For us to go off in a frolic and detour of other markets or the effect of other markets seems to us a total waste of time and takes away from moving or disproving part of Mr. Youngwood's case that he says he is most interested in.

So I frankly would like to get rid of this clause as quickly as we possibly can.

MR. YOUNGWOOD: Your Honor, I think that this would be handled when we will give you a statement of the issues. It is our contention that this is possible that we can handle it among ourselves. If not, I think that we will be able to ascertain at that point in time the degree to which Counsel might deliver action to the issues, at which time we do consider it as we indicated merely to be an effect of the b10

industrial gases part of our case.

I would comment for the record that we have four markets only. We have industrial gas market, medical pipeline systems market, inhalation therapy market, inhalation anesthetic equipment. Comments have been raised here only to an effect of acquisition of a stock insofar as related to industrial gases.

I don't believe that this is a serious problem.

MR. TOPKIS: Well, we certainly will be glad to cooperate with Mr. Youngwood in trying to eliminate the problem.

JUDGE BARNES: I pointed this out as being a question in my mind. And I think this discussion has been helpful. We have provided the way.

Is Complaint ready now to see what proof you have?

MR. YOUNGWOOD: I would just like to comment that Mr. Topkis mainly misunderstood my comment. We have no intention of eliminating this. We discussed it with him for the purpose of further investigations. But we have no intention at this time of eliminating it.

JUDGE BARNES: It may be up to me to do that.

MR. YOUNGWOOD: Yes, sir.

JUDGE BARNES: Complaint Counsel also gave me this morning an application for issues and of the subpoena. I haven't really had time to study it, but I would like to ask Mr. Youngwood if you have made a voluntary request for the information in subpoena?

MR. YOUNGWOOD: Your Honor, when this tentative offer was announced on December 10th, the Commission's staff had to determine the steps to be taken. We prepared subpoenas which were issued to officers of AIRCO, and we prepared a subpoena which was issued to Adrian Giordano, president of BOC, financial subsidiary of BOC, which had acquired AIRCO stock.

We delivered also a request made of Mr. Giordano who would contact our offices of BOC and permit us an opportunity of examining him under oath. We also asked that they be -- or bring with him certain other documents.

The requests that were made here to a degree reflect documents which were not produced under the subpoena or under the letter of the request. My comments at this point refer to-- They were other requests which were made in the course of the conversations between Counsel for BOC and to a degree, they also were not complied with.

We know, for instance, that British Oxygen company was in contact with several producers in the United States. We received not one bit of evidence in that regard, despite the fact that in our previous requests we were vary clear as to what it is that we wanted.

There are some portions here which we determined at the investigational hearing that we were in need of. For instance, although we asked for all documents which were exchanged between BOC and AIRCO, and although Mr. Smith, the Chairman of AIRCO, indicated that we would be provided with a five-year strategy plan, we don't have a copy of that.

We have therefore asked for that plan. We have asked for other plans which are similar in nature with respect to AIRCO stock.

We have a substantially shorter list of specifications. The specifications consist of an updating -- specifically number one for 1973. They consist also of a document which was requested of AIRCO at the investigational hearing.

Actually we requested other documents which were not made available. However, in an effort not to overburden them too much, we were limited very severely and thoroughly.

Although AIRCO furnished us with several documents relating to their sales, we think it is possible that they may have neglected to furnish us with all the pages the documents call for, specifically three. We have, I believe, four pages of that document, and I am sure that there should be more involved.

MR. TOPKIS: If I may just respond briefly, your Honor?

I confess I am a little at a loss. So far as I can perceive, every document that has been requested has already been produced.

JUDGE BARNES: Do you have a copy of one?

MR. TOPKIS: Yes, your Honor, I do.

And I know of no document responsive to the subpoena which has not been produced. But I will undertake to make available to Mr. Youngwood and to your Honor -- to immediately cause a certain search to be made and if there is anything in the subpoena that has not been produced, we will produce it immediately, or fly it over from London as fast as possible.

JUDGE BARNES: You have no action -- assuming that the subpoena were to be issued today -- you would comply with it? You would not file a motion to quash it?

MR. TOPKIS: We will file no motion to quash, your Honor.

MR. WADE: Your Honor, with respect to the AIRCO subpoena, I would just point out that during the course of another investigation we produced enormous quantities of documents. We produced seven cartons of documents in December and we have been producing documents since then.

The specifications one, two, and three in this particular subpoena insofar as they are updating, we will be happy to comply with. I don't see anything else in here that we haven't already produced except any specifications. One asks for documents which set forth total sales and market shares in the United States for each product produced, distributed or sold by . . . the Welding Products Division for the year 1973.

I am not sure that we have produced welding products or welding documents, and I am not sure that we should be required now to go back to AIRCO and ask them for anything except perhaps a summary, if Mr. Youngwood would like that. We could get that. But I don't think we should be responsible for numerous time in searching through the files in the Welding Products Division.

JUDGE BARNES: Well, I'm not going to consider the subpoena today and we will probably sign something along the order of the subpoena today.

You have ten days in which to make a motion to quash, but with your earlier motion, I would like to limit that to five days.

MR. WADE: That would be fine with us. And again, the only problem we have is the Welding Products Division.

JUDGE BARNES: Five days from the receipt of this subpoena. I guess it will have to be made out here today. So, five days from the receipt you may file a motion to quash.

Mr. Youngwood, you will have five days; that is, after the subpoena, if it is necessary. If it is not necessary, you can move on with the case.

Let me say that I will be out of the city. I will be in Chicago from April 1st through April 14th. I have a two-week trial in Chicago, and I would like to get these problems of discovery settled before the end of March, to know where we stand.

No, I don't have to have a return date before the end of May, but I would like to have all the rest out of the way before the end of March.

And let me ask Mr. Youngwood, did you anticipate any other compulsory processes?

MR. YOUNGWOOD: We anticipate that it might be necessary to have limited compulsory processes with respect to third parties, but only limited.

JUDGE BARNES: With respect to whom?

MR. YOUNGWOOD: With respect to third parties, only limited.

JUDGE BARNES: Would that be returnable at trial? Is that what you may anticipate, Mr. Youngwood?

MR. YOUNGWOOD: That I think is something which the responding Counsel and we might work out.

JUDGE BARNES: Well, in the complaint I notice you speak in the opening section about BOC being the second largest producer of industrial gases in the world. In each of the 19 countries in which it produces industrial gases, BOC is a significant competitor and in most of these countries it is the dominant competitor.

Do you have any information at hand now, or do you intend to prove which of these allegations are really necessary to the trial of this case?

MR. YOUNGWOOD: Your Honor, we intend to prove the allegations which are mentioned in the complaint. Ithink it is conceivable that the answer, which was filed by the respondents on this date. might admit that. I have not yet had an opportunity to read the answer. But I think that it is possible that it could even admit those particular allegations. I don't know.

MR. TOPKIS: Your Honor, our answer filed today does not admit those allegations. I would hope, though, that with Mr. Youngwood he could perhaps agree on a statement of the facts. And we will certainly be delighted to try.

JUDGE BARNES: Well, a stipulation of facts would certainly be welcome. It would shorten the trial for everyone. Any of these facts that can be agreed upon in the form of a written stipulation are welcome. It would certainly shorten the trial.

Mr. Youngwood, I assume that the schedule you have given me is dependent somewhat on a return on your subpoena. You say you will submit a list of documents by March 21st? You will not have a return on the subpoena by March 21st.

MR. YOUNGWOOD: Yes, sir. It should be understood that, of course, that that is dependent upon your Honor's subpoena. We are aware that there are any number of documents which have not been submitted yet. And when these documents are returned it will be complete. Our schedule does contain the paragraph at the conclusion of the schedule to the effect that our list of documents and witnesses shall be subject to supplementation or modification in the light of development and further prehearing procedures. After we are referring to a great degree to the return on the subpoena which your Honor is considering at that time.

MR. TOPKIS: Your Honor, just so that there won't be any misunderstanding, there may have been a document or two that was overlooked. That is surely possible, human beings being what they are. But except for such accidental omissions, Mr. Youngwood and his friends have everything. So, whether your Honor does or doesn't sign the subpoena isn't going to change the fact. And we are going to give him everything he wants within five days.

JUDGE BARNES: All right, Mr. Youngwood, I'm going to hold you to your proposed schedule here.

MR. YOUNGWOOD: That's fine, your Honor. I would comment that Mr. Topkis at the investigational hearing indicated words to the effect that they "picked up as much as they could." Well, they had the verbal hearing and they came over with whatever they could pick up at the time. And he said the return at that time was complete and there had been no attempt to make it any more complete with respect to the specifications served at that time. We would heed the schedule which we have provided.

JUDGE BARNES: All right, your list of documents then and your list of witnesses will be subject to amendment according to what happens during the pre-trial procedures. But I ask you to go ahead and follow your proposal which you have outlined here.

Does Respondent have any discovery that they could undertake at this time?

MR. TOPKIS: Yes, we do, your Honor. Well, before we leave, we have got two items that we would like to raise with your Honor.

One is the fact that the schedule proposed by Mr. Youngwood does not include the setting or a date for the start of the hearing, nor does it include, as the Pepsico case did, a date for the conclusion of all Commission's actions in this complaint.

And we have a motion that we would like to file with your Honor today. I appreciate that your Honor would perhaps want to refer to the Commission but we would like such relief. That is, a schedule all the way through the Commission's own findings.

And we also will have an application for subpoena duces tecum which we would like to file with your Honor. I will ask those two matters in whatever way your Honor would prefer.

JUDGE BARNES: All right, well, we will discuss the subpoena first.

MR. TOPKIS: Fine, your Honor.

I haven't yet filed it, but I will give copies to your Honor, and I will supply copies to my friends in an instant. I apologize for the poor copies, your Honor.

JUDGE BARNES: Well, just looking at the subpoena as to specifications, I assume that Mr. Youngwood is going to notify you of any expert witnesses he will call and the subject matter on which they will testify.

MR. TOPKIS: Yes, and we will be delighted to reciprocate, your Honor. That is really there in an abundance of caution, nothing other. And the same is true as in item six.

JUDGE BARNES: I would be just as happy to take these two specifications on out.

MR. TOPKIS: Fine with me, your Honor.

JUDGE BARNES: Mr. Youngwood, how much of this request is preliminarily written, and would you be willing to respond to without the necessity of a subpoena?

MR. YOUNGWOOD: Your Honor, I would like to give this request a little more thought. I would like to reflect upon it. And I think that we would be ready to respond within the five days to which you have referred earlier. And I would definitely like to give it more thought before committing ourselves to it.

JUDGE BARNES: For starters let me suggest that we hold that as an informal demand presented to Complaint Counsel this morning, then, of five days, Mr. Youngwood.

MR. YOUNGWOOD: We will tell you how much of this he is willing to supply voluntarily at the end of five days. You may present me with a formal subpoena.

MR. TOPKIS: Fine, your Honor.

Now, your Honor, would it be convenient to pass to the other motions that I have?

JUDGE BARNES: Certainly.

MR. TOPKIS: Here is a copy for your Honor of a proposed order and a motion of BOC expedited schedule, and I am giving a copy to my friends.

I could perhaps call to your Honor's attention that the specific relief that we ask here is that the hearing on the merits in this matter begin on April 1, 1974, and that all administrative procedures, including the Commission's final decisions, will be concluded by July 1, '74.

I am sure we all know that that's a very fast schedule and I had not known heretofore that your Honor had a trial scheduled on April 1.

Indeed, the April 1 date was chosen because Mr. Youngwood and I conferred on how soon we could both be ready, and we agreed that we could make it on that date. But the basic problem, of course, is this, that my client, British Oxygen, has $80 million at risk and it's dying to get a determination of what is going to happen to that investment.

Judge Latchum up in the District Court in Delaware has ordered that this matter -- or pardon me -- he hasn't ordered it -- that this matter be expedited. He has, rather, concerned his preliminary injunction upon this matter being given expedited treatment. And guided by the present condition of Pepsico, matters in which the Commission voluntarily agreed that it would set a specific schedule for hearings by the Administrative Judge for briefing before the Commission and for final action by the Commission following hearing, it set a day-by-day schedule for those events, it would be our hope that we would be entitled to no less considerate treatment.

We wouldn't suggest for a second, of course, that April 1 and July 1 are dates fixed in the stars, but something like that is imperative insofar as our financial situation is concerned.

JUDGE BARNES: Well, I can start this trial on May the 6th.

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MR. TOPKIS: On what, your Honor?

JUDGE BARNES: On May the 6th.

I will be in Chicago, as I said, for two weeks. I plan to take Easter week off for vacation. There may be one or two days of rebuttal in my Chicago cases. It is on the Encyclopedia Britannica, which I have scheduled for the week of April 29th.

Now as far as I'm concerned, the week of April 22nd would be free. I might have to take a couple of days off the next week in April to complete the Encyclopedia Britannica. However, if we start May 26th, we could go straight through to the end, or we could have a week's trial on April 22nd and come back on May the 6th. This is as far as my schedule is concerned. That is assuming that all pre-trial problems are out of the way.

Mr. Youngwood, how much time do you anticipate you will take?

MR. YOUNGWOOD: We anticipate that it will take two to three weeks to put on our case, sir.

JUDGE BARNES: And of course Defense, I guess, is a little indefinite?

MR. TOPKIS: Yes. We hope it to come in under that figure, your Honor. I know Mr. Wade and I both would like to move rapidly.

MR. WADE: I would certainly hope that we could come well under that figure.

JUDGE BARNES: Well, we could try it during the month of May. There are four weeks in May, or we could begin the hearing on April 22nd. I would just guess that there would be problems and so forth, and maybe we should start on the 6th of May. But I am willing to set that matter to comment on April 22nd for one week, and then to continue on May the 6th until conclusion.

MR. TOPKIS: Well, I think we would prefer the earlier start, your Honor.

MR. YOUNGWOOD: Your Honor, we have every desire to cooperate with the Respondent. It was toward that end that we submitted our expedited prehearing schedule. We also are in favor of an early trial. If the date is acceptable to Respondent, then it is acceptable to us.

MR. TOPKIS: Thank you. We appreciate that, your Honor.

JUDGE BARNES: All right. Let's assume that the trial would be completed by the end of May. You could still want at least 30 days to post findings, or would 50 days or 30 days?

MR. TOPKIS: Your Honor, in Pepsico, they did it on a ten-day schedule. We are willing to accommodate ourselves to that.

MR. WADE: As are we.

JUDGE BARNES: Fifteen days.

MR. TOPKIS: Or whatever is preferable, your Honor.

MR. YOUNGWOOD: Your Honor, I think I should probably correct the record. The schedule wasn't followed to this degree in Pepsico. Also, I think that the record should show that the original timetable which was set forth was unable to meet the timetable in Pepsico, and it was necessary to postpone it somewhat.

But I do think that I should set the record straight that the schedule was not followed that way.

JUDGE BARNES: Well, if I send this motion to the Commission, they are just likely to come down with a schedule that we will be unhappy with. I am willing to send it forth. However, I would propose that we set a trial date and that we have the amount of time needed for findings at the conclusion of the trial.

If everyone will agree, that will be only 15 days.

So be it. I am going to want more than 15 days myself.

MR. TOPKIS: I would not be at all surprised about that, your Honor. What we are really out to do, your Honor, is place the burden of proof on us, all three of us, and then a burden of proof on the Commission to undertake to act with great speed on this matter. And I would like to have this motion considered now by the Commission because I would not like to be told three months hence that "You should have alerted us to the fact that you regarded your cases as requiring the most speedy of treatments."

JUDGE BARNES: I will certify your motion to the Commission, but I will have some recommendations of my own.

MR. TOPKIS: I, of course, defer to these.

MR. WADE: And the suggestions your Honor has made are completely acceptable to us, but we join in Mr. Topkis' request that there will be a conclusion date set by the Commission and therefore join in the motion.

JUDGE BARNES: All right. Mr. Youngwood, will you have a copy of the motion? Do you have a response in five days? And I will certify it to the Commission along with my recommendations as to a trial schedule.

MR. TOPKIS: Do you want an extra copy, Mr. Gordon?

JUDGE BARNES: But you can bear in mind that April 22nd is fine with me to start the trial.

MR. TOPKIS: Fine, your Honor.

JUDGE BARNES: If not, the 22nd of May or May the 6th.

MR. TOPKIS: We will be ready on the 22nd, your Honor. And I might say if by chance your Chicago trial goes away, as sometimes happens with trials, we will be delighted to start earlier.

JUDGE BARNES: These are defense hearings and I am pretty confident they will go forward.

MR. TOPKIS: I see.

JUDGE BARNES: I had a trial scheduled for May 6th in a General Motors matter, but I am hopeful that that will be settled. And in any event, I did postpone pre-trial procedures in General Motors. I am certain that if they could not settle, they will not be ready for trial on May the 6th, so May is fine with me; also the week of April 22nd.

Is there anything else that we should discuss this morning?

I would ask that you get together on stipulations of fact. Any facts that you can stipulate would shorten the trial tremendously. Get requests for admissions in very promptly.

Any other problem?

MR. TOPKIS: Would your Honor wish to decide now where we will be trying this case?

JUDGE BARNES: Yes, I would like to hear some discussions on it.

MR. YOUNGWOOD: Will it be in London?

MR. TOPKIS: We are available, your Honor.

MR. YOUNGWOOD: We had intended to present our case in chief in Washington.

JUDGE BARNES: We have two more law firms. What are your thoughts on that?

MR. TIPKIS: Well, it is not only our being New York law firms that affects me, but I think almost all of our witnesses will be either people from London who, of course, could come to Washington, but would be closer to the source of information in New York, because that is where the BOC people, when they are in the United States, come. And AIRCO of course is in Montvail, New Jersey, which is about 40 minutes outside of New York City.

So I think so far as all of our witnesses are concerned, New York would be a far more convenient situs for the trial.

JUDGE BARNES: We could do something like this. We could hold a hearing in New York for company officials.

MR. YOUNGWOOD: I'm sorry, sir.

JUDGE BARNES: We could have hearings in New York City for company officials. We could complete the remainder of the case in chief in Washington. We could go back to New York for the defense, or we could have the entire trial in New York.

MR. YOUNGWOOD: Your Honor, we prefer to put on as much of our case in Washington as would be acceptable to you here. In the event that you would determine that it would be preferable to have that part of your case in chief as might relate to examination of BOC or AIRCO officials in New York, then we can accept that. But we would like to present the remainder of our case in chief in Washington.

MR. WADE: That's acceptable to us. We are really only interested in the convenience of our own witnesses that might be called by the Commission.

JUDGE BARNES: That's what we will plan tentatively, to have the case in chief in Washington except for that part of the case that involves the corporate officials. If there is a day of travelitis in there, we will have to take that.

The case in defense will go on in New York.

MR. TOPKIS: Fine, your Honor.

We thank you for that consideration.

MR. YOUNGWOOD: I would like to suggest, if I may, that we give consideration to calling for another conference, possibly at the conclusion of our schedule, so that after our documents are in, we can determine what it is the Counsel for the Respondents might be able to present us with -- with their documents to present us any filings that they may have ready to make available.

I think it might be appropriate now to determine where such conferences might be held.

MR. TOPKIS: We would join in that request, your Honor in the interests of getting things straightened out so we can go ahead rapidly.

JUDGE BARNES: We will have another prehearing conference the last week in March, toward the end of the week. We can set it for the 28th of March if you wish, right now.

MR. TOPKIS: That's fine with me, your Honor.

Is that all right?

MR. WADE: That's fine.

JUDGE BARNES: Very well. I will issue an order.

Any other matters which we will discuss?

MR. TOPKIS: Not that occur to me.

George?

MR. WADE: I don't have anything else, your Honor. We have nothing else to answer.

JUDGE BARNES: All right, I'll see you on the 28th of March.

Thank you for being here.

(Whereupon, at 11:50 a.m., the prehearing conference was recessed for further hearing on Thursday, March 28th, 1974.)

BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER :

of :

BRITISH OXYGEN COMPANY, LIMITED : DOCKET NO. 8955
BOC FINANCIAL CORPORATION :
BOC HOLDINGS, LIMITED :
BRITISH OXYGEN INVESTMENTS, LTD. :
AIRCO, INCORPORATED :

- x

Room 532, FTC Building
Sixth and Pennsylvania Avenue, N.W.,
Washington, D. C.

Thursday, March 28, 1974

Met, pursuant to notice, at 11:00 a.m.

BEFORE:

ERNEST G. BARNES, Administrative Law Judge.

APPEARANCES:

GEORGE J. WADE, W. FOSTER WOLLEN, R. BRUCE MacWHORTER and DANFORTH NEWCOMB, Shearman & Sterling, 53 Wall Street, New York, New York 10005, on behalf of AIRCO, INC.

GORDON YOUNGBLOOD and K K. THURMAN, on behalf of the Federal Trade Commission.

JAY H. TOPKIS and LEWIS KAPLAN, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022, on behalf of Respondents, BRITISH OXYGEN COMPANY.

P R O C E E D I N G S

JUDGE BARNES: On the record.

This is a prehearing conference in the matter of British Oxygen Company Limited, et al., Docket 8955. It is held pursuant to order of March 13, 1974.

At our last prehearing conference it was agreed that the matter would be public. Shall today's prehearing conference be public?

MR. WADE: We have no objection.

MR. THURMAN: We have no objection.

JUDGE BARNES: This is a public prehearing conference. Does anyone have a suggestion as to what we should proceed with first? Mr. Thurman, you have two subpoenas to be returned today. Has a return been made or do you have a witness?

MR. THURMAN: First, Your Honor, I am K K. Thurman. I was not on this case on the last pretrial, so I make an appearance for Your Honor today. We have turned over AIRCO's submission. Do we have the BOCs?

MR. TOPKIS: You have everything we have up to now. Mr. Kaplan and I have been in London for the last three days. We will be delivering it to you as soon as we can get it prepared.

MR. THURMAN: We have to look at the return to see if it is complete. We might want to examine the witness as to who prepared that and what files were checked. After seeing the submission, we might want to question the witness. Does Your Honor want the witness to return on BOCs or set another date?

JUDGE BARNES: I intend to set a prehearing conference for the week of April 15. I will suggest, Mr. Topkis, you get the documentary evidence to complaint counsel as soon as possible. He will have an opportunity to look it over. We can take that up at our next prehearing conference.

MR. TOPKIS: We will have it in their hands long before the 15th.

JUDGE BARNES: Fine. Mr. Thurman, if you decide you need a witness to go over the subpoena return on the 15th, I suggest you advise myself and the respondents.

MR. TOPKIS: Let me say if Mr. Thurman wants a witness on those documents, he only has to let me know and I will fly over a man. We want to move this. We will have somebody over within 48 hours.

JUDGE BARNES: How about the AIRCO subpoena, Mr. Thurman? Have you examined those documents?

MR. THURMAN: We just received it at the start of this pretrial. We are examining it.

JUDGE BARNES: Do you have a witness?

MR. WADE: The vice president of law has come here this morning. He has given the documents to Mr. Thurman this morning. They are complete with the accompanying letter of the status of production.

JUDGE BARNES: Well, if Mr. More could return at our next prehearing conference without any inconvenience, we could give complaint counsel until next prehearing conference to go over the documents.

MR. WADE: Mr. More will be present if Mr. Thurman wants him to be. He may be present anyway. Any time he wants information, he may call myself or Mr. Newcomb.

JUDGE BARNES: Mr. Thurman, you will be given until the next prehearing conference to have a witness called. You should not file respondent's at the earliest moment.

MR. THURMAN: Thank you, Your Honor.

JUDGE BARNES: I assume you are going to be using some of the material which you will receive?

MR. THURMAN: I think that is a safe assumption.

JUDGE BARNES: What is your schedule for providing respondents with a list of those documents?

MR. THURMAN: We certainly can't submit a second exhibit list until we get the returns from BOC. We can get it within a few days. We can get the second exhibit list. We would need some time after BOC to go through the same procedure. I am hesitant to offer a date at this time.

JUDGE BARNES: Let's set a date for the next prehearing conference now. I would prefer April 17 or 18. That is Wednesday or Thursday.

MR. TOPKIS: The 17th is earlier. That is fine with us.

JUDGE BARNES: All right. We will set a prehearing conference for April 17. Mr. Thurman, you have your additional documentary witness lists in prior to the 17th.

MR. THURMAN: Yes, sir.

JUDGE BARNES: What about protective orders on any of this material turned over to you by respondents? Is there any problem with confidentiality?

MR. TOPKIS: We have not had an opportunity to study them. I would assume there is no reason why there should not be a protective order applicable to documents turned over here. It seems that is a simpler way to proceed.

JUDGE BARNES: Do you have any outside consultants that you intend to use, Mr. Thurman?

MR. TOPKIS: I consent to outside consultants and experts rather than people from our competitors.

MR. WADE: We have the same general interest as Mr. Topkis has expressed in having the protective order. We are willing to include whatever expert Mr. Thurman retains or calls. We have a strong feeling that because we are in this U. S. market, that we should have a protective order applicable to the documents we have and may yet turn over.

MR. THURMAN: Your Honor, certainly I would have no objection at this time to give these documents protection. But

I think the order cannot go as far as granting in camera treatment on introduction unless they can show the sensitivity which these documents should not be on public record. It would be a problem in writing proposed findings and Your HOnor's initial decision if the complete record is confidential and in camera.

MR. TOPKIS: We can cross that when we come to it.

JUDGE BARNES: Let me suggest you keep all of these documents limited to personnel. If you do have an outside consultant, advise the respondents of his name and see if they have any objection.

MR. THURMAN: We anticipate possibly having a couple of medical doctors as consultants important to medical markets, relative product markets, pertaining to medical equipment. At this time I do not anticipate having any type of consultant on the industrial gas portion of the market.

JUDGE BARNES: The documents turned over to you by respondents are to be confidential. They are not to be disclosed to anyone outside of the Commission. If you do retain experts, advise respondents of their names and get their permission to show the documents to those experts who will maintain their confidentiality. If a formal order is needed, you may draft one and deliver it to me.

MR. TOPKIS: There is no need to bother. That is satisfactory.

JUDGE BARNES: I think that not all the documents are confidential. You should prepare a list of documents that warrant this special treatment.

MR. TOPKIS: We will. I am sure we can reach agreements with Mr. Thurman.

JUDGE BARNES: Has respondent's counsel lived up to its schedule?

MR. THURMAN: Yes, Your Honor. We were one day late on one particular phase. I believe it was the request for admissions. I apologize for being late. It was not mechanically possible to submit it on the date we suggested we would suggest it.

Our last item on the suggested dates which is the witness list will be submitted today. It will be before the closing of business today. That will complete our proposal to Your Honor as to how we would intend to follow the schedule.

MR. WADE: May I ask Mr. Thurman what item for requests for admissions and stipulations of fact have, in fact, been filed? We have not seen it. We did not see it downstairs. They were due three days ago.

MR. THURMAN: That was the item I was referring to. The request for admission of fact as we had proposed was to be filed and served on Monday of this week. We did not serve it. It was served through the mail. Maybe you have not received it yet. That was on Tuesday. A copy was filed with the Secretary of the Federal Trade Commission. Service was obtained through the mail. You should have it in your office.

JUDGE BARNES: I have a copy. Complaint counsel's initial request was filed on the 26th and mailed on the 27th.

MR. WADE: It has not seen New York yet.

MR. TOPKIS: I wonder if we could expedite matters more. We would be delighted to continue the practice of delivery of documents directly to complaint counsel instead of to go through the Secretary's office. Of course, we could go through the Secretary's office. We could exchange documents directly.

I have a Washington office and would be glad to offer its facilities so Mr. Thurman and I could make exchanges there and I could provide for Mr. Wade. It seems ridiculous a document filed on Tuesday has not as yet been received by Mr. Wade or myself and is not on file downstairs where we checked a few minutes ago.

JUDGE BARNES: Mr. Thurman, when you have apaper to file, you called Mr. Topkis' Washington office and that can be done.

MR. THURMAN: Yes, sir. I am surprised Mr. Topkis said it is not filed down below. It is.

MR. TOPKIS: They could be wrong.

JUDGE BARNES: Does complaint have additional discovery request or third-party request?

MR. THURMAN: Excuse me. You are asking today?

JUDGE BARNES: Are you going to have any?

MR. THURMAN: Yes. We will have third-party subpoenas.

JUDGE BARNES: That is for documentary material?

MR. THURMAN: Yes, for sales figures. It will be shipments of various third-party companies involved in these markets. We will have to do one of two things. We would like to attain a stipulation from Mr. Topkis and Mr. Wade as to what these sales are and not be required to call a witness. Both gentlemen have said maybe we can work something out like that.

We know what the sales figures are, but we have no documents on hand to show these. We will have to issue subpoenas on that or have them bring books and records to trial. We would not be able to give them advance documents as to sales figures of third-party companies if they will bring them in at trial.

JUDGE BARNES: Mr. Topkis has asked you now for some of your sales figure information. Have you made up your mind about using any of that or turning that over to Mr. Topkis?

MR. THURMAN: That is in his pleading?

JUDGE BARNES: Yes. Production figures, net sales figures, sir. Do you have such figures? If you could provide him with your information, perhaps you could work out a stipulation.

MR. THURMAN: Yes. The only thing I have to check is third parties have rights also in this proceeding. Expediting must not violate third-party rights, therefore we have to give them a right. If this is promised confidentiality, we have to give them the right to appear and plead their case. I can't plead the case for the third parties. We are forbidden by law where promised confidentiality is to turn sensitive material over to respondents without the opportunity of third parties of being heard.

We can contact these people about their objections of turning it over. Otherwise we will wait for trial and let them ask for confidential treatment at that time.

JUDGE BARNES: Let me call your attention to an application made by Union Carbide. They filed a motion. I assume respondents have a copy of that motion.

MR. TOPKIS: No, Your Honor, we have not.

JUDGE BARNES: Union Carbide filed with me on March 19 an application for protective relief. It is documentary material [illegible] assume they turned over to complaint counsel. I also received a copy of a letter which the law firm of Paul, Weiss, Rifkind, Wharton and Garrison addressed to the Secretary of the Federal Trade Commission. That letter is dated March 15, 1974.

Again, Union Carbide is requesting confidential treatment of documents. They also attach to their letter of March 15 a letter dated January 9, 1974, from the Secretary of the Commission to Robert Donald, Esq. in New York City. It discloses the Commission did promise Union Carbide certain confidential treatment. However, the assurances of confidential treatment of Union Carbide also stated that the foregoing is given with the understanding in the event of issuance of adjudicative proceeding. In this matter it shall be governed solely by application of the Commission rules of practice Part 3, rules of practice for adjudicative proceedings.

So the understanding which you gave Union Carbide at least made allowance for use of these documents in an adjudicative proceeding. So, some arrangement has to be worked out now to give these third parties an opportunity to make known their objections to disclosure of documents. What can be done about that?

MR. THURMAN: We certainly can advise we would give a ten-day notice of documents we are going to turn over. The confidential material to be used in a trial, complaint counsel can use these. We have no authority by the rules to give up third-party documents in our possession that we are not going to use in this proceeding. It is incumbent upon respondnet's counsel to make a demand on third parties to protect their rights.

They first have to go through the third-party source before they can turn to the Commission to demand documents from the Commission. We certainly will. We have listed our documents. Anyhow we expect to list. Certainly we will give them notice.

We are going to use those documents that we have.

When the third party comes in, we will tell them we are going to give them to respondent's counsel. They apply to Your HOnor for some type of protection or move that they not be turned over.

JUDGE BARNES: Any documents which you intend to use which you have promised confidential treatment, you get in touch with the third parties. You tell them to file a written motion with me on or before April 12, stating their objection to turning the documents over, what kind of confidential treatment they desire and also advise them they can appear in person on April 17 if they so desire.

MR. TOPKIS: If Your Honor please, might I call your attention to a series of facts I believe Your Honor is unaware of? There is no secret about this. All of these people know about it already. They know about it from Commission counsel. Henry Sailer is here representing Air Products. I did not tell Mr. Sailer that this proceeding was going on today. I am sure Mr. Wade did not.

MR. SAILER: I learned a half-hour ago.

MR. TOPKIS: Union Carbide obviously learned about it two weeks ago. Liquid Air learned about it. In short, and I will take counsel's statement to it, but I believe Commission counsel has long sense been in touch with most of these people. I think our timetable can be accelerated.

JUDGE BARNES: Complaint counsel promised some of these companies a ten-day notice. I am advising Mr. Thurman now to get the notice out to them. Give them their ten day's notice today.

MR. TOPKIS: When did they promise a ten-day notice? I did not know of such.

JUDGE BARNES: It was in the letter I was provided a copy of. The Commission will not disclose the documents' information until ten days after the notification.

MR. TOPKIS: Could it be ten days from today? Today is March 28.

JUDGE BARNES: I will give them until April 12 to get any written motions in and the right to appear on the 17th of April if they feel an appearance is necessary.

I would like to get to the BOC respondent's request, motion for subpoena duces tecum.

MR. TOPKIS: Could we be supplied with copies of whatever notice complaint counsel gives to these third parties?

MR. WADE: That is any such motions be served upon Mr. Topkis and myself. WE have not received some papers.

MR. TOPKIS: We would like service to be made at my Washington office for both myself and Mr. Wade. I think that can properly be put in the notice.

JUDGE BARNES: Any notice can be filed at the Secretary's office. You can have courtesy copies.

MR. THURMAN: We might do that. As far as those, we might not file them by telephone. These are documents complaint counsel will use to be turned over.

JUDGE BARNES: This is the ruling at the present time. It may be extended upon. If you call by phone, send Mr. Topkis a letter.

MR. THURMAN: I have no problem with that.

JUDGE BARNES: The BOC respondents have made a motion for subpoena duces tecum for certain documents under the Commission's posession. Under Rule 336 it is specified what the contents of the motion shall be. There are specific requirements. One of the requirements is showing that such material, information or testimony is not available from sources by voluntary methods or pursuant to Section 3.33 and 3.34.

Mr. Topkis, I find that your motion is lacking in a showing of relevance. Also if you have attempted to obtain information from other sources. It is lacking.

MR. TOPKIS: So far as relevance, I can say simply the techniques we employed were given to us by the Commission. They thought these matters were relevant. We took a subpoena which they served on us in this proceeding calling for certain information. We took a few items and said you think it is relevant. Please produce the documents on the same subject matter meeting the same definition and the same tests and specificity which you have obtained from other people and let us have those.

We did the same thing in connection with a request that the Commission made in its gasses investigation. The Commission there sent questionnaires to AIRCO and to six other companies in the gasses industry. They told us. Those questions were quite detailed. A copy is appended to my papers.

We said to the Commission if you thought these questions were relevant to the matters involved in your investigation in which investigation you continued and ultimately obtained this complaint against BOC's acquisition of interest in AIRCO, we would like the information you thought relevant and pertinent.

The best proof I can make is the very point you averted to this morning. I would imagine at some point the Commission will have to prove some relevant markets and who has what market share. The only way they can prove that is by producing the sales figures of the companies involved. That is what they asked those companies for.

They asked me to stipulate to those sales figures. The one thing they seem unwilling to give me are the documents on which those sales figures are recorded. I think as a relatively reasonable human being I refuse to buy something when I don't know if something is a pig or a poke.

You asked AIRCO for its market share. Everything I say is prefaced by saying what appears in our papers. We will accept any reasonable stipulation for protection of any of these documents. We have no reason to abuse anybody's confidence.

JUDGE BARNES: You say "six other companies." Is that going to satisfy you if you get information from six other companies?

MR. TOPKIS: They say there are six companies to which they addressed their questionnaire. If there are other companies in the field where they want information, I want whatever they get from those companies. I did not get the figure "7" from myself. I got it from Mr. Thurman. He said they sent it to seven companies.

JUDGE BARNES: I wonder if you would later come in and ask me for subpoenas for ten other companies.

MR. TOPKIS: It is my present opinion to ask for no more. We have made all our plans for trial on April 22. We are going to do nothing to interfere with that schedule. Your Honor asked me whether we have sought to get this information from other companies. I will tell you we have made some inquiries. We asked Liquid Air. Mr. Kaplan did.

The opportunity was gently but graciously declined. Union Carbide has filed with Your Honor for protection. They are not going to give it to us voluntarily. Mr. Sailer is here, but I can't expect him to jump up into the air with glee to turn over material to us. I think this is a classic way of stalling a proceeding which is to be expedited.

Clearly there is no way to expedite any effort to be frightful in any degree. Therefore I think we ought to go ahead and recognize reality. These companies will not produce voluntarily. If the subpoena issues, they can come in then. They can then demand protection. I think this comes down to this.

We have produced everything that has been asked of us as has AIRCO. The rest will be within a day or two. Mr. Youngblood said there seemed to be deficiencies in our production. We went to London. We found he was right. We made corrections. We are prepared to play show-down poker. We are not hiding behind any delaying tactics. And we are not interested in anything but the most forthright and prompt determination of this matter.

The only way I know how to get it is to play show-down poker with appropriate confidential treatment given to everything. We could litigate everything to the Commission and the Supreme Court and get done in 1984. I thoguht we had determined that we were not going to do that. For that reason I respectfully suggest that we have made an adequate showing of an attempt to obtain voluntary production.

There is no likelihood of voluntary production. So far as relevance is concerned, I call as my principal witness, complaint counsel. I can go through the items we have requested and demonstrate their relevance.

JUDGE BARNES: I would like you to do that. I have problems with some requests that you have made. If we go to the letter ---

MR. THURMAN: May I respond before we go into this? Mr. Topkis misses the point completely in making a statement as complaint counsel is trying to stall. You cannot throw the rules out of the window and go on a fishing expedition and say give us everything you have without listing anything and violate third-party rights.

JUDGE BARNES: We are not going to violate third-party rights. They will have the rights as if I issued a subpoena to them. Do we have to go through subpoenas to all of these companies again? It will save time, energy and efforts on everyone's part if we utilize relevant documents in the Commission's possession.

MR. THURMAN: I would like to make it clear Mr. Topkis talks about relevant documents and turning our subpoena around. It was an investigational subpoena. It does not mean everything is relevant in that subpoena. He is talking about industry-wide investigation and not investigation for this case.

MR. TOPKIS: I am talking about both.

JUDGE BARNES: He is talking about both. I realize that your letter was a broad investigational letter. I appreciate that everything that he has asked for may not at the present time see the relevance of any of the items. I thought we would go through them one by one.

I would like a statement on some of the requests. Look at paragraph 1. I would like to know the relevance of production capacity or what is the relevant cost to construct these plans?

MR. TOPKIS: So far as production capacity, I understand these questions went to all the industrial gas producers in the country. If that be true and that is the representation made to me, presumably the answer to this question will establish the industrial gas production capacity of this country today. We will know what share of that production capacity AIRCO has. I think that is a significant factor in determining what the market is. It is capacity market rather than sales.

JUDGE BARNES: Why would not sales suffice for purposes of this proceeding?

MR. TOPKIS: The productioncapacity indicates the elasticity that is available to supply additional needs. If I as an outsider am thinking of coming into a market because I suspect that there may be unsatisfied supply, I may or may not be influenced in that decision if I know that people on the site have tremendous over-capacity going unutilized.

In General Dynamics, decided last week, that was the same kind of thing. So far as cost of plant is concerned, that goes to the question of how easily you enter a market. If it costs $25,000 to put up one of these industrial gas plants, that is an interesting factor. Our understanding is it costs a good deal more.

I am sure the Commission is going to be claiming it would be easy for BOC to enter this market. I want to know what it would cost us.

JUDGE BARNES: Could you submit your proof through officials of AIRCO who have been in the business for years?

MR. TOPKIS: Rather than press the point, I will withdraw it. If there is any gas that AIRCO does not make or produce, I would like to know what it costs to produce such a plant. But Your Honor is right. I could get that from AIRCO. I will withdraw the cost request.

JUDGE BARNES: On paragraph 2, you asked for production of each gas. Is it necessary to have each gas?

MR. TOPKIS: That raises a question we might resolve this morning. It is an important question in this case. The complaint speaks of industrial gasses. It embraces within industrial gas carbon dioxide, helium, oxygen, nitrogen, argon and various others. Those gasses may be lumped together under the heading "Industrial Gasses" just as the Census lumps together metals and includes steel and copper.

I would like to know and we ought to know in the interest of guiding our trial preparation whether the Commission contends there is one market in substance called industrial gasses possessed in the inquiry of the market supply and demand or is the Commission talking about individual markets in each of these gasses?

I think we are entitled to know the answer to that. I don't know how we can put together meaningful figures unless we know the answer to this inquiry framed in the letter. I particularly would like to know right now before or after we conclude our discussion of the subpoena which it is complaint counsel is serving.

JUDGE BARNES: Go to the third paragraph. Here we have each problem. In 4 and 5 you are asking for sales to different type customers. What is the relevance of that?

MR. TOPKIS: First, there is a possibility that we are talking about separate markets. It is direct industrial accounts and sales to distributors. If we are not, fine. I will withdraw the request for information as to distributors, but I still need information to direct industrial accounts or some form of information about tonnage contracts.

As I understand it, in this business a standard way of operation is something like this. A steel company puts up a new mill. Most steel today is made with an oxygen process. The steel company will call on one of these air separation companies to install a tonnage plant close to the steel mill. The tonnage plant will produce oxygen in tonnage sizable quantities. There are 400 or 600 tons a day.

There are even some 1,000 tonnage in contemplation or construction. That is one kind of sale. You produce the oxygen there next to the mill or petrochemical company or whatever. Another is to distributors, people selling these gasses for use in metal work like acetylene-cutting and so on. Those sales are made in individual cylinders. We don't need to know the information about sales to distribubrs include that the complaint counsel can bend that to mean sales to a separate market. In any event, we need to know the tonnage arrangements.

JUDGE BARNES: You need four?

MR. TOPKIS: Yes.

JUDGE BARNES: If you have four, can you subtract a -- say we now have five?

MR. TOPKIS: We probably could, but there are intermediates. I think the best answer is that the people who framed this questionnaire had been spending some months doing so. The people who answered the questionnaire spent a good deal of time thinking about it. They are the best judges. They thought the questions were necessary and appropriate. I confess I am not as alert as I hope to be on April 22 to the subtleties of this matter.

JUDGE BARNES: How about paragraph 9, price schedule?

MR. TOPKIS: It is my understanding that unlike most industries where the Government or the Commission claims that there is concentrated conditions prevailing to price levels and industrial gasses have dropped steadily for years. I want very much to be able to prove that. The best way I know of to prove it is from the company's own price schedules. That is exactly what I asked for.

JUDGE BARNES: Are these prices a matter of public knowledge? Are they published in any trade journals?

MR. TOPKIS: I know of no trade journals which carry them regularly. I am told there are none. I am asking for price schedules, not details of individual transactions. I am asking for price schedules. If a trade announcement preceded or accompanied distribution of price schedules, we would like a copy of it.

These are not highly sensitive documents. I am not looking for a document which would get a company in trouble with the Robinson-Patman Act. If we went into selling prices, it would take us forever.

JUDGE BARNES: We go now to 13 and 14. They involve exchange agreements. What is the relevance of exchange agreements?

MR. TOPKIS: BOC, according to complaint counsel's theory, is a company which might have entered the American market for this acquisition. One of our defenses will be that it is very difficult to persuade anybody to accept you, a foreigner, as a supplier of oxygen. Even if you put up an oxygen plant next to a steel mill, if that oxygen plant goes down for even a brief time, the reslt may very well be that the steel mill will have to shut down or get oxygen somewhere else.

Typically we say a steel company looking for a tonnage supplier wants to be assured that that tonnage supplier will have backup capacity. If the tonnage plant goes down and production stops, which happened last year in England for three months, and compressors went out, the steel company wants to know do you have backup capacity available?

One way to have backup capacity is the ability to have exchange agreements with other companies. We are told that there are very, very few exchange agreements in this industry. In order to negative that, we can establish backup capacity with exchange agreements, we want to demonstrate there are not exchange agreements. We expect answers to Item 13 are zero. I don't know what AIRCO's response was, but I am confident they don't have many. They are not the common practice in the industry as they are for petroleum. There you have exchange all over the place.

JUDGE BARNES: 14 is the same?

MR. TOPKIS: Yes.

JUDGE BARNES: 16, what is the relevance?

MR. TOPKIS: 16 relates to the degree to which these companies, industrial gas account companies and tonnage contracts move around. Your Honor will recall in General Dynamics' case there was reference to long-term supply contracts. I think here, too, we have many, many long-term supply contracts. There are 10 and 15, 20-year contracts. I don't think there will be any significant number of answers to Item 16. That, too, we want to demonstrate in short that there is no great flexibility here.

So far as 17 is concerned, that relates to the capacity of companies to build industrial gasses plants. Since what we are talking about here is BOC entering by building a plant, we would like to know how many other people are there who have the capacity to build industry gasses plants? I think the answer to that is very simple. It is probably known to most people in the industry.

We would like to have it established as a matter of record. The fact is, I mean no denigration to my friends at AIRCO, it is my understanding that AIRCO is the only major American company in the American market which does not have this capacity. I think that is a critical point in our defense. All the other majors have the capacity to build their own plants. AIRCO does not. Through a close relationship with BOC AIRCO will be provided a kindly uncle, if you will, who has that capacity.

JUDGE BARNES: How about 18?

MR. TOPKIS: Well, 18 is designed to develop the degree of shopping around that companies do in this market. Do companies tend to confine their invitations to bid? Do they shop around a great deal? Once you have a customer for plants, do you have a continuing and solid customer nobody can take away from you? That is what we are out to develop there. They have the idea that BOC could have entered this market.

We want to demonstrate this market is tough as hell to enter.

JUDGE BARNES: 24 is rates of return.

MR. TOPKIS: That is, of course, a delicate area. If there is any more critical area, I cannot imagine it. If the figures are nobody is making much money in the industrial gasses business and that is my understanding, you would have to be out of your mind to want to come into such a disaster area.

British Oxygen's chairman testified when interrogated by Commission counsel in December that the American market was appraised by him as being such a disaster area. We must know the facts. I know you don't know how else we can prove it.

JUDGE BARNES: Would it be necessary to know the rate of return for each type of gas?

MR. TOPKIS: Again, we have each problem. I must say I find it difficult to imagine a market made up of industrial gasses. You cannot substitute carbon dioxide for oxygen. You use carbon dioxide to make Pepsi fizz and oxygen for welding. You will not try carbon dioxide for steel-working. Please don't put oxygen in my Pepsi.

JUDGE BARNES: This is related to various industries?

MR. TOPKIS: It is interchangeability of products. There is the cellophane case. Are we talking about industrial gasses? I cannot imagine it. We were there talking about flexible wrapping because celophane and various other substances could wrap. But oxygen and hydrogen cannot serve the same purpose nor can nitrogen, argon, carbon dioxide or other gasses we are talking about here. I cannot imagine anything more incomprehensible than that marked called the industrial gasses market.

If they want to speak only of an industrial gasses market, that is fine with me. I want to know.

JUDGE BARNES: How about 32 and 33? These are figures that were produced to the Department of Commerce and Bureau of Census. What is the need for these figures assuming you get everything up to now that you want?

MR. TOPKIS: The desire here, Your Honor, is for compatibility of figures. I am sure Your Honor has before had the problem of getting figures from different places and they don't match. Here the Department of Commerce publishes the totals it gets. We have those figures. They are very reliable. They are traditionally used in antitrust market cases. We would like to know in order to present to Your Honor the best evidence that does not have built-in contradictions the input the companies gave to the Department of Commerce which resulted in the totals. We are going to be talking about market shares, for example. This is a pretty good way to do it. It is the best way, in short, to get the best information to Your Honor. That is what we are interested in.

JUDGE BARNES: Let's go to request for access to files.

MR. TOPKIS: One is activities and possible sales of your companies relating to production and marketing of industrial gas, I would like very much, for example, to see this. I think one of the most valuable documents we are going to offer to Your Honor is a study that British Oxygen prepared in late 1969 and '70 in which the conclusion was reached that it would be crazy to enter into the American industrial gasses field. It did not make any sense.

We have that document. You will see it. I would like to see a parallel document from Air Products or Liquid Air or Union Carbide saying, for example, what we have to do is investigate ourmoney elsewhere than in industrial gasses because that is a disaster area. I will tell you that big companies make such plans.

Another document we will be presenting to Your Honor is a BOC priorities allocation. That is where we decided that we would invest~~igate~~, first, in Europe, second in South America, third in Japan, fourth somewhere else, and if there was any money left over, maybe we would think about the United States and use something there.

JUDGE BARNES: You invested $80 million in a disaster area?

MR. TOPKIS: We invested in AIRCO. That is a different matter. The question was should we enter as a new entry? We are not. We are coming in with a company on the scene. The problem will be can you as the English come into a market on a green field basis? We call it grass-roots. You will see the term "green field." That is what this means. The answer was always "no."

JUDGE BARNES: One, two and three are quite similar, I think.

MR. TOPKIS: I think so, yes. 6, 7 and 8 relate to the development estimates by companies that there is no likely growth in the national markets in industrial gasses. The industrial gas market has reached the saturation point. They are regional markets. There are regional companies here my friends on the Commission's staff may be pointing to. Burdett in Cleveland, Big Three on the Gulf are regional companies.

If the Commission has in its possession any documents relating to analysis made on national or regional markets, we would like to be able to take a look at them to decide whether we think it is appropriate to call Your Honor's attention to them. If the Commission thinks they are pertinent to counsel's position, you are going to see it.

Why should you not see it if it is pertinent to our position? That is the problem we are wrestling with. We are trying to play catch-up in a great, great hurry.

MR. THURMAN: I would like to respond to that particular one. I hope I can have a chance to respond to all of this.

JUDGE BARNES: Let's not do that. In No. 8 you want to know plans of other companies for production and so on. Why would planning of other companies have relevance to what BOC actually did here?

MR. TOPKIS: It has this relevance. If every company in the industrial gasses field had decided we are not going to expand our production and there is no need for further production, this market is vastly over-supplied. Let's get the hell out of that business and put our funds into some other field.

Most of these companies are diversified to some degree. That would bear strongly on the question of whether BOC sitting in Britain would have reasonably decided to enter the United States where all the American companies were deciding not to expand. We are going to present the chairman, Leslie Smith. He is going to come in and testify that BOC never would have contemplated entering this field on a green field basis.

The best way to corroborate that is to have the plans of his prospective competitors that they would not have expanded either. I realize those are confidential documents. I will take whatever blood oaths are appropriate to protect the confidentiality, including not showing them to my client. I do not think it fair for him to see it.

JUDGE BARNES: Do you have an outside consultant?

MR. TOPKIS: We will have one, I hope. I am meeting with them on Monday. I would be entirely prepared to follow the same roots of identifying him and swearing to confidentiality.

JUDGE BARNES: You would accept an order prohibiting the disclosure of any of these documents to any officials of BOC or AIRCO? Is that correct?

MR. TOPKIS: I would hope that would be done with some discretion. There are some documents I don't think require keeping them from our client. I am a lawyer. I don't know.

JUDGE BARNES: That is why I asked about outside consultants.

MR. TOPKIS: May I review these and see if there are any particular ones I might want to show my client? Certainly I would be willing to entertain that idea. In their position I would want the documents kept confidential.

JUDGE BARNES: Let's go to 10 and 11, construction of pipelines.

MR. TOPKIS: One way you can enter a gas market is hooking onto pipelines. We want to know what pipes are owned by what companies. That will give us a picture of available distribution of facilities and the possibilities for entrance that way.

JUDGE BARNES: This is not public information in some form?

MR. TOPKIS: Not that we know of, sir. Certainly there is no great secret about it. The fact Liquid Air owns a pipeline system when the pipeline is sitting in Arkansas with "Liquid Air" written all over it is not a matter of great secrecy.

11, bids to customers purchasing gas products by pipeline. In all candor I am not sure I know what that means. I think the Commission counsel was seeking to be advised as to either bids on tonnage contracts or bids by major users supplied by pipeline.

Again, this would go to the question of ease of entry. Are plants captive plants or are they available for bidding by new possible entrance on the scene? I think that is what they are driving at. I would like to know the answer to the question.

JUDGE BARNES: 14, you have been over that. That is comparable to an earlier item. If you were to receive a statement indicating rates of return, why would you need a group of documents which might discuss or refer to the return on investment?

MR. TOPKIS: I would waive it.

JUDGE BARNES: You waive 14. How about 15? You waived cost before.

MR. TOPKIS: Yes. 15 would go by the board.

JUDGE BARNES: How about acquisitions?

MR. TOPKIS: Well, I think with the Commission asserting that this industry has been becoming more concentrated within the last 15 years, which I think the complaint says, the facts as to acquisitions are necessary in development. I don't care particularly how they are going to be developed. I would like to know, however, what acquisitions there have been.

As far as joint ventures, I am particularly interested because for all I know, Commission counsel will suggest we were a potential entry by direct green entry, but a joint entry. I would like to know if there have been joint ventures. The best way to get the answer is this way. Surely there cannot be any secret about the fact that a couple of large American corporations have made a joint venture to put up a plant.

JUDGE BARNES: You are asking for all files contained, memoranda, studies, policy guidelines, internal correspondence pertaining to, sir.

MR. TOPKIS: Perhaps we are not clear. We are not asking for all of that. We ask only for documents the Commission counsel took from the companies. I don't imagine they took every document. They took the important ones. We would be happy with those. I cannot see for the life of me why not if we agree we will not abuse them. If we agree their confidentiality will be protected, what harm is there? How else are you going to get a full picture?

It has come to me with rather flabbergasting impact, but I have the feeling the position of Commission counsel is what they should turn over to us are the documents that prove their case and what they could not turn over to us are the documents that prove they are wrong.

JUDGE BARNES: That is what you get in every lawsuit.

MR. TOPKIS: No, not since Brady against Maryland and not since the Federal Rules of Procedure have you got it in civil cases. When we ask, it is absolutely outrageous to be met with the suggestion "Go get it yourself." Come on. We are past that. We are supposed to be brothers-in-arms aimed at a common objective. At least I thought that was the position of the Government.

The Government wins when justice is done. That is what we are asking for.

JUDGE BARNES: All right. Let's go to Specification 1 of Adrian Dewinsupana. These are third-party documents which analyze merger agreements. Why would that be relevant or helpful to you? Why does anyone care what third party said?

MR. TOPKIS: Supposing a Union Carbide executive read in the newspaper BOC made a tender for AIRCO stock and immediately sent a memoranda to his financial adviser to say isn't it nice to have BOC aboard. They will add to the competition in the market.

I might get lucky. It has happened before in litigation. It does not happen. After all that, the contrary is the case. What is to be lost by our getting whatever they received?

JUDGE BARNES: If you turn up a lot of documents saying this is going to be very trade-restraining, would you agree complaint counsel could offer that in their case?

MR. TOPKIS: No, I would not propose to offer the document in my case. I would not think a document written by a third party is available for testimony.

JUDGE BARNES: It might lead you to call a witness.

MR. TOPKIS: Sure.

JUDGE BARNES: Specification 4 seems fairly clear to me, but let me ask you about 4. Entry by any person or organization into the production distribution and sale. This could go down to the distributor level?

MR. TOPKIS: We have excluded them.

JUDGE BARNES: Would that be limited to the manufacturer's level?

MR. TOPKIS: I would be prepared to limit it if there is an ambiguity about it. I thought we undertook to do that. If not, I apologize and amend it.

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JUDGE BARNES: Number five, I am not happy with it.

MR. TOPKIS: I am joining you. I am not happy with it. I cannot say I have asked before the other side. It is a little unusual. I can say to things. One, I represent a total stranger, BOC. I do have a degree of cooperation from AIRCO, that is true. They are preparing their case and I am preparing mine.

I look to my client for instruction and enlightenment. My client cannot give me the leads normally a client would give.

Second, in the Justice Department proceedings in recent years, it has become reasonably commonlace that such lits be provided. All of the way through it has been our contention and respectful submission that we are entitled in Section 7 cases to whatever relief from the Commission we would get if the other administrative agency were enforcing the law.

Certainly the oddity that dictates industrial gases are required by the Commission in copper and aluminum by the Department of Justice should not change the measure of fairness of treatment.

JUDGE BARNES: Are you not prepared to withdraw Number five?

MR. TOPKIS: No, Your Honor. I would not.

JUDGE BARNES: I believe that covers it. Mr. Thurman, a-2

do you wish to make a brief response?

MR. THURMAN: I would rather have Mr. Youngblood go down each specification if you want. I disagree with anything Mr. Topkis said. I agree that entry barriers are extremely high.

JUDGE BARNES: We don't want to get into what the facts are. This is a case where there is a preliminary injunction that Federal Trade Commission obtained. We wanted an expedited trial. Why can't we be more liberal?

MR. THURMAN: I don't think you can trow the rules completely out when a third party is involved. Mr. Topkis completely ignored my statement that these letters he is talking about were an industrywide investigation. Most of the stuff is not relevant to this proceeding.

They are in a joint venture with Airco. We would not be suing them if they were not so large in this market. They know everything that goes into this market. I think it is up to the Commission to be liberal. I cannot be liberal. I go by the rules as to what I can turn over to him. That is what we are going to use.

He says we want everything. He asked for the world. When he asks for the world, he might not need Airco.

JUDGE BARNES: He has been very responsive in stating he would treat this material confidentially.

MR. THURMAN: I don't know how confidential with the

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relation between Sterling and Airco.

MR. WADE: I object to that. It is totally out of order. One of my partners is a director of Airco. I have offered one member of the industry a protective order which precludes Mr. Stanley as Airco personnel.

MR. THURMAN: If third parties want to turn it over and have a protective order, I don't object to it. As far as turning them over on protective order, that is not for me to decide.

JUDGE BARNES: The answer you filed certainly did not go into relevancy in any great extent. This is just as Mr. Topkis' motion did not go into relevancy. That is why I gave him an opportunity to explain this morning. I assume you are going to oppose turning over the documents. The matter will have to be based on my order which can be reviewed by me.

If you refuse to comply with my order, the Commission can review it and make a determination. It is going to involve time. If we can work out arrangements for confidential treatment and notify third parties, what is your objection?

MR. THURMAN: I would object to material which he has asked for. Mr. Topkis made it sound like a lot is relevant. We will rebut each statement he made. If you would like to take up that time. He made statements we don't believe are true. Prices, for instance, going down, sir.

He can prepare his own defense. He wants me to a-4

prepare his defense for him and prepare the Government's case also. He has not made an effort to find out what is going on because he knows what is going on in this industry.

He says we have to get this trial over with because we have $80 million invested. If he does, he knows it is not a depressed market. Some of this cannot be turned over. The census documents are protected by law. I cannot turn that over to them. The Commission cannot order that turned over to them.

They have a full statute protecting them. Some of this stuff is impossible. I would like to impress on Your Honor, if I can, there is a broad industrywide investigation that had nothing to do with this case. Some of it was relevant. The Freedom of Information Act does not give him the right to this. This will be our position.

If third parties say turn this over, certainly I am not going to object. I am not going to turn it over on my own initiative. I don't think I legally can.

JUDGE BARNES: I think you legally can.

MR. THURMAN: What we are going to use, we can turn over?

JUDGE BARNES: What can be used in adjudicative procedure can be turned over. This is by either party.

MR. THURMAN: It says what complaint counsel is going to use. They don't know what they want.

JUDGE BARNES: You would be using what I order you to turn

turn over. It would be proper and legal.

If you do not chose to turn it over, the Commission will have to rule on it. I would like more briefing on the census and commerce figures. Mr. Topkis is not willing to waive those two requests. I would like briefings on that.

MR. TOPKIS: I am advised that the answer S8 362 U.S. where the Supreme Court held although the statute said the Census Bureau may not turn over information which it receives pursuant to such questionnaires, a copy of the questionnaire in the hands of the company is available to process.

JUDGE BARNES: That is an FTC case.

MR. TOPKIS: It is not. Actually we are not sure. It is the St. Regis Paper case. The test is the statute.

MR. THURMAN: St. Regis was before the statute.

JUDGE BARNES: Give me a legal brief on two specifications. File it by tomorrow night. I want to have it Monday. I want to rule on this.

MR. TOPKIS: Can we have it in your hands at 9:00 a.m. Monday?

JUDGE BARNES: Yes.

MR. SAILER: I am Henry Sailer. I represent Air Products and Chemicals Corporation. I want to inquire as to whether Your Honor intends to give third parties an opportunity to be heard in respect to this matter at an appropriate time?

After all, these are our documents as complaint counsel said. My notice of this proceeding was a matter of minutes.

JUDGE BARNES: I believe before the documents are turned over, you will be notified and given an opportunity. Whether or not the Commission will permit you to file briefs, if it goes to the Commission, is up to the Commission

MR. SAILER: I am inquiring to Your Honor.

JUDGE BARNES: You will be notified and given ten days.

MR. SAILER: You are going to treat the matter of these documents other than those that complain counsel intends to use exactly as the other?

JUDGE BARNES: Anything turned over voluntarily would fall under this ruling. If he determines he is not going to turn over any documents, it would be up to the Commission to notify you. The Commission would decide.

MR. SAILER: Your Honor is going to rule on the objection of the subpoena. Do you intend to hear from third parties before you make those rulings?

JUDGE BARNES: No, sir.

MR. THURMAN: We are to brief the Census data?

JUDGE BARNES: That is in the Commerce Department to specifying as to whether or not the Commission can turn them over.

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MR. THURMAN: Previously you could not subpoena from the Commerce Department but from the companies. That was when the law was changed.

JUDGE BARNES: Put it in your brief.

MR. THURMAN: Your Honor, may Mr. Youngblood be heard to talk about relevance as you and respondent's counsel went down the list?

JUDGE BARNES: Can you put this in a brief and have it to me by Monday morning?

MR. THURMAN: We will brief it.

JUDGE BARNES: I would suggest you make it brief. Don't give me a lot of arguments about industry investigation. I want to know why you feel, very briefly, the specifications are not relevant to complaint allegations or to any possible defense which Mr. Topkis suggests he may have.

MR. THURMAN: I am not sure of his defense.

JUDGE BARNES: He mentioned them. You might need a copy of the transcript in order to make a response.

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MR. TOPKIS: We will gladly join the Commission in application for a rush copy. It costs us more than it costs them.

JUDGE BARNES: Can you order this?

MR. TOPKIS: I don't believe so. In the past, Your Honor, we could order, but I believe Your Honor has to. A year ago we could.

JUDGE BARNES: Are there other areas we should cover?

MR. TOPKIS: If you please, there are two subjects I would call to your attention. That is the question of whether complaint counsel claime~~d~~s industry gases are the relevant market or there are individual markets as to eash gas. I really would love to know that at the earliest possible moment. We are playing blindman's buff until we do.

I would like to know in this case whether we are dealing with potential entry by British Oxygen, does counsel claim we would have come in on a green basis or does it claim we would have come in by a so-called toe hold acquistion, an acquisition of a company smaller than Airco? The later is claimed, and I don't suggest this as an alternative, I think complaint counsel should be compelled to identify to us any companies they think are proper candidates for toe hold acquisition so we can focus on those companies.

MR. THURMAN: I can tell Mr. Topkis right now; it is either through internal expansion in this market or through a toe hold acquisition, but our burden does not go to what Mr. Topkis is trying to say it does. We are not going to say who you could have gotten. We are saying you are potential through a toe hold acquisition, and Airco is not a toe hold. That is as far as we will go.

JUDGE BARNES: You are not going to give him names of companies?

MR. THURMAN: Certainly we will. We will give it through witness' testimony and documents.

JUDGE BARNES: He know that.

MR. TOPKIS: We are entitled to know to frame the issues of this case. Who does complaint counsel contend we might have acquired as a toe hold?

JUDGE BARNES: That is an itemization of the evidence.

MR. TOPKIS: Can we go to identification of the markets? Do they assert in markets, industrial gas or individual gases, and if individual gases, which ones?

JUDGE BARNES: Can you comment, Mr. Thurman? The complaint says industry gases.

MR. THURMAN: May I have a moment?

I think the proper way to be done is for them to move for a more definite statement. If YOur Honor wants me to state what the complaint says, I will do so.

JUDGE BARNES: That would help.

MR. THURMAN: Even though the complaint states market or submarket, our position is the industrial gases are the relevant product market. We have other relevant product markets for others.

JUDGE BARNES: Is there a full line producer?

MR. THURMAN: Airco and some others. To prove a market, you don't have to prove every relevant submarket. We are not. There are no relevant submarkets in this. We don't think it is necessary. It is to their advantage.

JUDGE BARNES: Are you proving the industrial gases market?

MR. THURMAN: That is our position.

MR. TOPKIS: I welcome that statement.

JUDGE BARNES: Do we have other problems?

MR. THURMAN: I have two. I believe we have these answers back from respondent, and one admits and the other denies. Airco admits something. Is that an admission by both parties?

JUDGE BARNES: I don't think so. This is not a conspiracy charge.

MR. THURMAN: Airco is in a position to know what they do. If they admit, certainly BOC was in a position to make a check and see whether it is right or not.

MR. TOPKINS: I am certainly willing to take a hard look that we have denied if Airco admitted. If that is the case, I will check.

JUDGE BARNES: Both should reexamine your answers and file amended answers if you feel it is necessary.

MR. THURMAN: The purpose of the pretrial was to get the respondent's schedule. When will they give us the exhibits' list and a schedule as we provided?

JUDGE BARNES: Can you give him a tentative list?

MR. TOPKIS: To begin with, that is the first time I have heard anything about that.

JUDGE BARNES: I don't think that was the main purpose.

MR. TOPKIS: That does not phase me at all. I am prepared to state our expectations. So far as a witness list is concerned, I could give him a tentative witness list two weeks from today. So far as documents are concerned, I have an idea of a lot of documents that we are going to use from our files. But I would like a little more time than that to do that. This is going to be our case. According to the schedule, you are going to start on the 22nd, run for a week, break for a weak and resume on the sixth.

JUDGE BARNES: I am not sure.

MR. TOPKIS: I hate giving lists and then changing them drastically. I would be prepared three weeks from today. That is the 18th to give our friends a list of the documents we proposed.

JUDGE BARNES: The witness list is by the 11th?

MR. TOPKIS: Yes.

JUDGE BARNES: Let me suggest we plan on starting May 6th. I will be available on the 22nd, if we can have anything concrete we could do. I doubt it. Assuming the Commission turns over documents to you, I am not certain. I assume the Commission would rule. You would not be prepared to go ahead?

MR. TOPKIS: We will be prepared. If you said tomorrow, I would say to Your Honor, we are ready.

JUDGE BARNES: Maybe you don't need all of these documents.

MR. TOPKIS: That is the burden I am willing to accept, but I should not be compelled to do it.

JUDGE BARNES: I don't think a week or two is going to be that important to your plan. I would shoot for May the sixth.

MR. TOPKIS: I am forbidden to acquiesce in that, Your Honor. I would urge there is no great reason why we can't get started on April 22. Whatever they do with those documents will be done, and we will be ready to procede. I am not asking for adjournment in this case. I may go to the Commission and say please make them give me those documents and now but that is a matter to fight out with the Commission. I would delay Your Honor to delay the trial because of a possible happening. I would request that you begin on the 22nd?

JUDGE BARNES: I am still going to leave the date open. We will see how we make out on the 17th.

MR. THURMAN: If this a continuous trial sir?

JUDGE BARNES: If we go on the 22nd, there is a week hiatus.

MR. THURMAN: We would need time to talk to their witnesses. If we have no time to talk to their witnesses, that is not fair to us. We were planning on putting BOC witnesses on the stand.

MR. TOPKIS: They are available.

MR. THURMAN: There may be another foreign witness from England. Are we going to London to put them on the stand?

JUDGE BARNES: I certainly hope so.

MR. TOPKIS: We will do it there or here. BOC will bring people over when and if complaint counsel wishes them.

JUDGE BARNES: This is the third party. You should find out if he is available to come here.

MR. THURMAN: We ca- get in touch with them. Some third parties would be from Canada.

JUDGE BARNES: Let me suggest seriously that you look over the request that BOC has made for Commission documents considering their offer of confidential treatment and protective orders. See if you can't produce these documents voluntarily notifying the third parties. See if you can't agree to produce these. If there is any particular request that you feel you cannot honor, maybe we can meet with Mr. Topkis. I will be available to meet with you all informally and see if we can turn these documents over. I intend to recommend that the Commission make some of these documents available. If you feel you can.

MR. THURMAN: We will certainly try to prove what might not be relevant, if we get permission.

JUDGE BARNES: Tell them you are willing to turn them over.

MR. THURMAN: Most of this is relevant to the industry but not to this case. Certainly we will not turn over irrelevant documents.

JUDGE BARNES: Tell me in your brief what you will turn over. Certainly some of it is relevant. The only problem I have is with the Commission rule about the third party sources. I feel in a case where there is expedited trial maybe we should waive that. So, when you prepare your memorandum, if there are areas you are willing to turn over, say so in your memorandum. Say this because the latter is not relevant. Certainly rates of return and sales figures, production capacity and those things seem highly relevant. You are going to be turning some of those over to him.

Just because you make them available to Mr. Topkis does not mean he is going to be offering them into evidence. What is relevant for discovery may not be necessary for trial. Are there other areas?

MR. TOPKIS: We have nothing else.

MR. WADE: We have nothing else.

MR. THURMAN: May I have a second?

MR. YOUNGBLOOD: If I may, I would like to know when Mr. Topkis can make available to us the man who prepared the return on our subpoena. I would like to know what day this man will be here.

JUDGE BARNES: I think he said when.

MR. TOPKIS: I cannot say tomorrow. It will be early next week. It will be Wednesday at the latest.

JUDGE BARNES: Would the gentleman be available on Friday?

MR. TOPKIS: Peter Lasiter has had responsibility for assembling the documents. When you asked for documents, you turn to a lot of people and try to assemble them. Mr. Lasiter will be available all next week.

JUDGE BARNES: Is he from London?

MR. TOPKIS: Yes, but he is coming over Monday.

JUDGE BARNES: How about the next week?

MR TOPKIS: I think his plans are to be here the next week. In any event, we will make the person available to counsel as I say on 48 hours notice.

MR. YOUNGBLOOD: Possibly we can set a date now.

JUDGE BARNES: Receive the documents and then get in touch with Mr. Topkis.

MR. TOPKIS: Possibly it can be a subject that a person who did detail will be better on than Mr. Lasiter. Let us know who you want.

JUDGE BARNES: He says 48 hours notice. I think that is reasonable. Get your documents and call him up and say your 48 hours are running.

MR. YOUNGBLOOD: Okay.

MR. THURMAN: We have nothing else.

JUDGE BARNES: All right.

(Whereupon, at 12:55 p.m. the prehearing conference in the above-entitled matter recessed.)

BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER

of

BRITISH OXYGEN COMPANY, LIMITED
BOC FINANCIAL CORPORATION
BOC HOLDINGS, LIMITED
BRITISH OXYGEN INVESTMENTS, LTD.
AIRCO, INCORPORATED

DOCKET NO. 8955

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Room 332, FTC Building
Sixth and Pennsylvania Avenue, N.W.
Washington, D. C.
Wednesday, April 17, 1974

Met, pursuant to notice, at 11 a.m.

BEFORE:

ERNEST G. BARNES, Administrative Law Judge.

APPEARANCES:

GEORGE J. WADE, W. FOSTER WOLLEN, R. BRUCE MacWHORTER and DANFORTH NEWCOMB, Shearman & Sterling, 53 Wall Street, New York, New York, 10005, on behalf of AIRCO, INC.

GORDON YOUNGBLOOD aND K K. Thurman, on behalf of the Federal Trade Commission.

JAY H. TOPKIS and ~~LEWIS KAPLAN~~, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York, 10022, on behalf of Respondent, BRITISH OXYGEN COMPANY.

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PROCEEDINGS

JUDGE BARNES: This is a nonpublic prehearing conference. I believe our last prehearing conference was public. This will be a public prehearing conference in the matter of British Oxygen Company, Limited, Docket No. 8955.

It is being held pursuant to my order scheduling this prehearing conference issued on March 28, 1974.

Respondent, BOC, had made a request for certain documents in the Commission's files. At their last prehearing conference, I indicated that I was going to make some of those documents available to respondents.

I reiterate this position here this morning. I intend to issue an order tomorrow, a written order, requiring the production of a substantial number of those documents, not all of the documents, but certainly, a substantial portion of them.

At the last prehearing conference, I advised complaint counsel to get in touch with the third parties who had furnished this Commission the documents, and give them whatever notice that had been promised them during the investigation.

I assume that that has been done because I have received a substantial number of motions or letters from third parties in regard to their documents.

It is my intention to make these written submissions a part of the official record. I will incorporate them in the record when I issue my order. In the event that the Commission chooses to review my ruling, they will have this material available to them.

Also, the third parties were advised that they would appear here today and make a brief oral presentation if they so desired.

It is my understanding that a group of the companies is represented here today and if there is no objection, I propose to permit them to make a brief oral presentation to supplement their written submission. Is that satisfactory with everyone?

MR. THURMAN: Yes, Your Honor. In lieu of your statement at this time, we said we would. The Commission, we believe, had. We don't think they are anywhere close to being eligible to look at this material. We don't even think it is a closed question at all.

I ask, at this time, if Your Honor is going to certify this, or we can ask for permission to make an interlocutory appeal.

JUDGE BARNES: You don't have to ask permission for a question like this so I will not certify it.

The Commission can review this for their own accord if they wish.

MR. THURMAN: Do you wish to sign their subpoena, or are you going to issue an order.

JUDGE BARNES: Issue an order. For that reason, I suggest that third parties limit their objections to the type of protective order they desire or if they have some arguments on relevancy, I will listen to that at this time. Who would like to proceed first?

MR. SIERCK: My name is Alexander Sierck, member of the law firm of Weld, Harkrader and Ross of Washington, D. C., which firm represents Union Carbide in this proceeding.

I would just like to make one point, and that is that in any order that you give requiring the production of documents in the hands of the Commission of the nature that were produced by Union Carbide, that there be some sort of stay, separate from the date of the order as to the time when the documents must be turned over so that Union Carbide, if it desires to, may appeal such a ruling.

Obviously, if you issue an order that the documents were to be turned over immediately, that would moot any possibility for Union Carbide taking whatever steps that they wish to.

In this connection, Union Carbide has written you a letter as of April 5, 1974, which, very briefly, requested that Union Carbide be given five days to appeal any disclosure order, and that the effective date of the actual disclosure be stayed until the Commission rules on your order, plus a ten-day period for Union Carbide. In addition, Union Carbide would have

I thought we could work out something a little bit more reasonable. I was going to suggest that the attorneys for British Oxygen and AIRCO be allowed to review the documents at the offices of the Federal Trade Commission.

Upon review of the documents, if they feel that any of those documents are relevant to their proceeding, they should select those documents and then come back to Your Honor with a specific motion for the production of copies of those documents.

Then we, as outsiders, can make specific objections instead of academic arguments as to the reasonableness or relevance of the documents.

I have no idea what the issues are in this case. I have no idea what they may consider relevant from our files. I do know what I consider sensitive. It may be that documents which they think are relevant, I don't consider sensitive. If that is so, we are certainly wasting everyone's time arguing that protective order.

I would like to propose that as an alternative. Just briefly, too, I would like to mention British Oxygen's main point in their brief because because I think they are somewhat absurd to feel that they can get this information from anyone else and pretend to be as unsophisticated as this about the U. S. market.

I think they are ignoring the fact that officials of those companies visited our facilities on more than five or five days to prepare papers to submit to the Commission if it so chooses.

Simply for Your Honor to refresh your recollection, Union Carbide does have a letter from the Commission dated January 9, 1974, that, in short, made an undertaking of the entire submission to Union Carbide.

If there be no disclosure of Union Carbide documents with that ten-day notice, while the ten-day-appeal period stands, we request that some comparable form of protection be put in your disclosure order.

JUDGE BARNES: I believe that you, or someone else, did give me a copy of that Commission letter.

MR. SIERCK: Yes, sir.

JUDGE BARNES: I have it.

MR. SIERCK: That concludes my statement.

JUDGE BARNES: Thank you.

MR. LYNCH: I am John P. Lynch of Kirkland and Ellis. I appear here today on behalf of Chemetron Corporation. I want to say at the outset that I am a little bit dismayed by your announcement this morning because I understood from the Federal Trade Commission attorneys that this was to be a proceeding to determine whether or not those documents would be turned over, not simply to determine what type of protective order would be granted. I, frankly, would not have come down if I had known it was the latter.

six occasions in the past year to discuss aspects of the U. S. market in talking about joint ventures with our particular company.

So how they can contend that point to Your Honor, and pretend that they are unsophisticated about the U. S. market is beyond me.

On top of that, the attorneys for British Oxygen and AIRCO are at the corporate offices in Chicago today and tomorrow discussing the facts of their case and the expected testimony of certain of our executives in this case with those executives.

Now, if they think they need information from our client, today and tomorrow is the day to get it, not through the guise of trying to get our business records that we turned over to FTC with an understanding that we would not be disclosed.

I categorize their requests, and their requests are so clearly of the type of business information that courts have always declared as confidential and should not be disclosed except under the best protective order one can imagine.

They want to get, for example, information from our customer lists. This is in there, Item 16, and Documents Request 11. They want to know profit information which is Item 24 and Documents Request 15.

They want all of our market analyses documents, six through eight. They want to know all of our marketing practices and policies. They want the census reports that we turned over for the convenience of Congressmen, and they want to know our production capacity.

Now, I could go on ad infinitum as to why they are censored. I understand that AIR Products has some people here who can better describe that latter point.

I would like to see, frankly, if we have quid pro quo here. We have been burned in the last couple of years by some larger manufacturers in the production of industrial gas because Chemetron does provide good manufacturing capability because we have the major producing ability.

We asked them to build our plant for us and when the word went forth that Chemetron was thinking about building a plant up in the northwest, we got beat to the punch by them. I report that while we are competitors, there is nothing wrong with it, but I certainly don't want these people to see what we have got planned for next year. I don't want the same thing to happen again.

I think you will get a better idea of the sensitivity of the documents if you would hear from the people and their products.

MR. SAYLER: Your Honor, I am Robert Sayler, member of Covington and Burling, representing Air Products in this proceeding.

I would just like to address a couple of points. The first is the extraordinary sensitivity of many of the documents that are now in the possession of the Federal Trade Commission; at least, insofar as they relate to products. The documents which they have are literally establishing a select list of the most sensitive documents that the company has.

There are in their files, the company's future plans, going five years forward which reveal all of the company's major strategies.

There is detailed cost, financial data, pricing data; not only general business data, but with respect to specific accounts, there are customer lists; there are contracts.

All of these documents, Your Honor, have been maintained in the utmost confidence by the company for a considerable period and have never been revealed to outsiders.

They are maintained in some confidence even within the company; that is, only specified individuals within the company are permitted access to these documents. We simply feel that any order from Your Honor must reflect the fact that there are, at least, some documents which are sensitive and ought not to be produced.

We would hope that your order would delete from the subpoena at least certain categories.

JUDGE BARNES: Can you identify those categories for us?

MR. SAYLER: I would do that, and I would ask you to entertain a few remarks from the company business people who have day to day familiarity with these documents.

It appears to me that the most sensitive documents they have, subject to check with my client, are these categories: Long range marketing plans and strategies; names of individual customers or opposite parties in contract negotiations; specific cost data -- especially current, or relatively current cost data; selling prices to individual accounts as distinct from general sales lists; termination dates and locations of those with whom my client has contractual relationship; rates of returns and finally, any documents that the company may have collected as a result of confidentiality commitments to yet fourth parties; that they would review the fourth party's documents and have those documents but only if they would never be revealed to anyone else.

Your Honor, as I mentioned, I do have with me today Mr. Daniel L. McGinnis who is Controller of the Industrial Gas Division of Air Products.

I wonder if he might just give a couple of minutes of a particular situation of the kinds of documents that fall within each of those four or five categories I just listed.

JUDGE BARNES: Very well.

MR. McGINNIS: Your Honor, I am Daniel McGinnis. I am Controller of the Industrial Gas Division of Air Products and Chemicals. I participated in the assembly of some of the documentation that we turned over to the Federal Trade Commission.

I would like to take the area that Mr. Sayler has mentioned and specifically refer to some documents that we turned over.

In the first area, the area of future plans, we turned over to the Federal Trade Commission our five years' strategics plans. These plans included our investment decisions. I would like to say new investment decisions; our pricing strategies, new product development research, our distributor and dealer plans, and a good deal of competitors' strategy and information.

In the area of detailed financial data, we turned over internal financial information distributed only to selected management members of our company.

We turned over return on investment and return on sales analysis; profitability analyses by product and by area of the country, the area of cost information.

We have given to the Federal Trade Commission plant investment and product cost information by products and by area; distribution cost information which, in our business, is very important, and the cost of serving individual customers. In the area of pricing, they have our general price lists by product and by area of the country and by customer.

In the area of customer information, they have customer names, customer contracts of all our major customers, MR. THURMAN: Your Honor, on the basis of the protective order, there is one more document that we have listed on our exhibit list that we have not turned over to Mr. Topkis. We need a protective order for this particular document. Complaint counsel intends to introduce this document through Mr. Dempster as it was received from Mr. Dempster, who will be appearing on Wednesday. So, if we could get a protective order to cover this one particular document which had their plans to enter the U. S. market.

JUDGE BARNES: What is the nature of the information in the document?

MR. THURMAN: The nature of the document is Liquid Air of Canada's plan prior to entering the U. S. industrial gas use market, to their form of entry, how they planned to enter, what companies were available for acquisitions, as such.

JUDGE BARNES: When are you going to turn this over to Respondent?

MR. THURMAN: As soon as we get a protective order.

Also, Your Honor, I might add on this, maybe it is a little premature in saying as soon as we get a protective order -- some portions of this document are in French. We believe that we would have to interpret that and get a certification as to the interpretation of the French.

JUDGE BARNES: When are you going to do this?

protective order which is basically tracted, a protective order like the one which has just been negotiated in the pending Xerox case, jointly proposed by complaint counsel in that case and counsel for respondent.

It basically says that there will be no production of any documents except to designated individuals specifically listed by the outside trial counsel and designated outside experts, that none of the documents, summaries or extracts be communicated to anyone other than those designated individuals, that in the event any of the documents are to be produced for trial, we would be given any of that and the opportunity to seek en camera treatment or other forms of protection.

It also provides for refurnishing the documents at the completion of the case. I would like to submit, as well, to Your Honor ---

JUDGE BARNES: Do you have a copy of that with you?

MR. SAYLER: I sure do, and I have supplied complaint counsel and counsel for respondents as well as counsel for all third parties here today.

MR. RHODES: Your Honor, my name is James M. Rhodes of the Coudert Brothers' law firm representing Liquid Air, Inc. I just have a couple of comments that I would like to make.

Liquid Air sought to cooperate with the Commission staff in its general investigation and as did the other companies who have been heard, produced voluminous data and documents, most all of which, we consider to be extremely sensitive information.

As Mr. Lynch earlier mentioned, it is somewhat difficult to respond to Your Honor concerning what is sensitive without knowing exactly what might be at issue here but nevertheless, I would like to illustrate some of those documents, some of those information categories which are considered by Liquid Air to be particularly sensitive which we do not believe have any relevance to the type of inquiry that is at issue here.

But moreover, we believe it is sensitive. It must be given some sort of internal protective treatment. I might say that the type of procedure that was outlined by Mr. Lynch appears to be particularly attractive since it would serve to focus on what might really be at issue here.

The documents that were presented by Liquid Air included such things as differential market projection studies, regional new plant studies, regional five-year plans -- that is on a divisional basis; analyses of market versus production facilities, and divisional target account programs.

I think it is clear that from a description of that type of documents about which we are talking, they are the most sensitive type of marketing plans which we would not like to fall into the hands of our competitors because, of course, then if they wish, they could be our larger competitor, to be able to meet our plans to bring new competition into various markets in which we do not presently have the type of competitive effect we would like to have.

We also produced such data as actual production, or capacity figures and cost figures which, to a large extent, govern marketing strategies, marketing plans.

JUDGE BARNES: Are those production capacity figures public knowledge in any fashion?

MR. RHODES: We believe that they are, in the aggregate, by the industry. Some of the same data is reported in the form of confidential reports to various governmental agencies which, I believe, is the subject of Specification 1 in the proposed subpoena which would call for that in Paragraph 32 and 33 of the letter which went out to all third parties.

I believe such reports would be called for by copies of the central courts. It is our understanding that various Government agencies do compile certain of that information, in the aggregate, in a form which does not disclose the individual company reporting.

One of the proposals we made in our paper filed with Your Honor was that some protection might involve a submission through the disinterested third parties of such data if it is relevant to the inquiry, the compilation in the aggregate, and the use thereafter.

Such other information that we produced are company rates of return and various contracts we had with other parties including exchange of agreements which are particularly sensitive and which permit a company as small as ours to have a more diversified effect in the national market than they would otherwise have.

In any event, and in conclusion with respect to all of these categories of documents that I mentioned and information, we believe that not only is there no doubt that they are the most sensitive type of information that should require confidential treatment here and very limited disclosure, if at all, but there are definite questions with respect to relevancy.

I might finally suggest that we, of course, would like to have sufficient time to consider possible appeals from any order that we thought did not fully take into account our needs for confidentiality, but I think that the type of proposal made by Mr. Lynch provides sort of a two-step, if you will, approach by which we can maybe bring down the documents and information to a point that perhaps there would be no problems, there would be no unusual issues, or that they would be of much smaller magnitude than exists here today. Thank you.

MR. WITT: I am Willis Witt, counsel for Big Three Industries, Inc. We previously had submitted a request to the Commission for protective relief in this matter which outlines nine specific categories of information that we feel are particularly sensitive, and which we feel would be extremely detrimental to Big Three if the Commission disclosed that information to our competitors.

I join in what has been said by counsel for Chemetron and Air Products and Liquid Air. We request that none of those documents be made available and if the court should rule otherwise, that we be given protection, as set forth in our request to the Commission, for that specific information elicited before it is turned over to respondents in the matter.

JUDGE BARNES: Thank you, Mr. Witt. Does any other party wish to be heard?

MR. DUDLEY: My name is Robert Dudley, general counsel for Liquid Carbonic Corporation.

When we submitted the information voluntarily to FTC, it was our understanding that the information was going to be held in confidence. We feel terribly shaken that this information may now get into the hands of our competitor.

We aren't even certain as to whether any or all of our competitors voluntarily provided information to the FTC. We feel that it would be a terrible injustice if it turns out now that Liquid Carbonic, who voluntarily submitted this material, would have that exposed to our competitors whereas, those who don't voluntarily submit this material, would not. In other words, it would be in a better position.

I don't know whether this is true or not, but it is a concern. We are aware as to what the issues are in this case. It would seem, on first blush, that the only real issue would be the size of the market, of the universe and if this be the case, I don't think it would leave any problem with indicating what our gross sales are of whatever universe it is, what the product is.

I understand it is industrial gas. However, if it is so defined as industrial gas, maybe this information would also be a matter of public record to the Census Bureau reports which our Corporation has had to file, and which we also made available to the FTC in our efforts to cooperate with them.

JUDGE BARNES: Thank you, Mr. Dudley. Does anyone else wish to be heard?

MR. TOPKIS: Could I possibly clear something, Your Honor? I really think that is rarely done, but sometimes, it still happens. We are close to total agreement.

Just to take off matters, one: it has been our position all along that we would regard any documents that we sought by this subpoena as covered by an appropriate protective order.

I can advise the court that Mr. Sayler and Mr. Sierck have shown us, as they said, a form of protective order. With the most modest modification which we have discussed with them, that protective order is satisfactory to us. I think the modifications are satisfactory to them.

It is a matter of form only, not substance, so we are agreed to a protective order.

JUDGE BARNES: I do not have a copy of the modifications, do I?

MR. TOPKIS: No, I don't. We haven't even written them. We want to be able to show the material to our designated experts and I can, right now, state who the designated experts are. They are a Boston consulting group, Stanford Research and Robert R. Nathan. And so with the protective order, we have no problem.

Now, so far as Mr. Lynch's suggestion that what we ought to do is look at everything in the Commission's office, well, I really think that if we can look at them in the Commission's office, we ought to be permitted to take them back to our office and look at them subject to the same restraints.

I work better, and my tail feels better in my own office than in the Commission's locale. I don't think that makes any difference. If I am covered by a protective order, I am covered in my office as well as here.

He says that we ought, then, to state what documents we propose to use. I am in complete accord. I propose to advise Your Honor and complaint counsel, and I would be delighted to advise these various gentlemen which, if any, of the documents that they have submitted to the Commission and are turned over to us, we propose to use in this case.

We will give them advance notice and if they want, then, to request any en camera treatment or anything else, they will be free to do so.

I think it would be a terrible waste of time to do that in advance of trial. It is entirely possible that we, you know, we will change our mind and decide not to offer material, equally. I may say: I wouldn't think that we could be bound as to documents that we might use to cross-examine if, for example, some company executive gets on the stand and testifies, to our surprise, out of keeping with the document that has been furnished to us.

Well, I would think we ought, then, to be free to cross-examine him with it, but there could be protection there. We could, perhaps, give 24 hours' notice, or something like that, or his counsel, if we were talking about documents of such a high order of secrecy, would probably be sitting there in Your Honor's courtroom, and they would advise and consult on the matter right then and there.

So I don't really think we have got any problem here. The only problem that I perceive is how fast we ought to move. I heard one of my colleagues, I think it was Mr. Sierck, ask that you stay the effect of your order until ten days after the Commission decides this matter.

Well, I don't know why that should be. Mr. Sierck may propose, or anybody may propose, then, to go to hearing, off to the circuit court and to the Supreme Court. So I think they ought to be compelled to move the next day, and nobody should be stayed by Your Honor; rather, they should follow the appropriate procedure, what is regularly done. If you want to stay, it is to request the court, that you are requesting to act on the issue. That is the usual practice.

Then we could go before the court and say, to borrow vocabulary from friends, it is outrageous; it is ridiculous, or whatever.

I think that, in short, we agree that we are dealing with sensitive documents. There is no doubt about that. We would want protection if they were our documents. We have sought protection of documents that we have turned over, and Your Honor has accorded that protection to us. My friends are entitled to the same protection, and we are prepared to give it

Thank you very much.

MR. THURMAN: Your Honor, just to agree with Mr. Topkis, I have also seen how they weighed the proposed protective order and confidentiality. I have absolutely no idea of how he thinks I am agreeing with that record.

There is a clause that we would permit outside consultants to look at the documents but then later on, it says that they can be obtained at Mr. Topkis' office or my office, and would suggest that some of them might wind up with outside consultants who would have signed an affidavit of confidentiality but basically, I have no disagreement with that.

We recognize the sensitivity of these documents, that

that their clients compete in this market, and we understand that concern. We are perfectly willing to abide by that concern, and to give them whatever confidential treatment we can consistent with the proper process and other than that, I don't frankly, see any disagreement.

I reiterate concern for the time schedule, but I am sure that Your Honor has been through that several times, and is quite well aware of that.

Mr. Topkis is very generous in his offer to give his support for his fishing expedition. We are going to fight this to the limit, to forbid them to come to our files. It will be said that is not a part of this case.

I think I have stated this before, and I hope to make it clear that this industrywide investigation has nothing to do with this case whatsoever. So they want to go ahead and look at things throughout this industrywide investigation to get knowledge that can be claimed for this case, but I submit that it has nothing to do with this, that there is relevancy to his case.

If they think it is all important what Airco's capacity is, if they want any information, they don't have to know this industrywide capacity. There is nothing in there.

They should not be allowed to come here and fish, and say that they think this is relevant. I have to state right now that what they are looking for, just because the case is to be expedited, should not circumvent the rules. It is very clear they have to go to third parties and ask for what they want. They have rights, too.

Due process would be violated. They should not be allowed to come and climb over our back. We are talking about a protective order for material that is not even relevant to this case just so they can look. They don't even know themselves what they are looking for, so they should not have a free access to the Commission's files in an investigation that has nothing to do with a Section 7 case.

So therefore, I submit that they should not be allowed any type of protective order for something they don't even know what they are looking. They should not be allowed to come in and fish.

Now, they have had plenty of time to go to third parties and seek what they have been fighting to get from us all along and certainly, Mr. Topkis talks about wanting to expedite this case on the one hand and stalls it on the other hand by not going to these third parties but trying to fish in our files.

We have prepared a protective order, and we intend to implement it. We have to introduce sales figures of individual companies in this proceeding, whether we do it by some kind of request or admission of fact, or whether we do it by having the companies bring in their books and records and testify on the stand.

We are filing this today. I don't know if Your Honor has received a copy of this or not.

JUDGE BARNES: Yes, I do.

MR. THURMAN: It will specify items of sales figures we are going to have. Mr. Topkis should have to do this same thing, to specify what he wants, and what he is getting from third parties. We have no objection. I have no objections to publish that in the record if the third party doesn't.

I think it is there. I think that it should come from their files, not something we got in an entirely different investigation, and that investigation is certainly not an exception to the Freedom of Information Act. He certainly can't use that.

We have no objection, of course, if he got it from the third party and got a protective order and asked for en camera treatment when they come to trial.

Certainly, I plead with you that you don't issue an order to let them come in and fish in the file for something that has nothing to do with this case.

JUDGE BARNES: I will consider all of these arguments I think I have heard enough arguments on this. Mr. Sayler, do you have something?

MR. SAYLER: I just don't think we can agree with Mr. Topkis: "Yes, we are in agreement." We could not be further apart. We do not think every document should be turned over. We are clear that certain categories of documents I gave you ought not be turned over.

The protective order we have put into the record only because of Your Honor's introductory statement that much of the documents would be ordered to be introduced as backup and only as an alternative do we submit the protective order as bare minimum protection that we think we are entitled to on any documents that are produced out of this subpoena.

JUDGE BARNES: Thank you. I will consider all of the arguments and the papers that I have before me. I intend to have a ruling out by Friday.

MR. LYNCH: I might bring out one other point as long as I am here, and counsel for both sides are here.

Mr. Thurman just mentioned this point about sales, getting sales figures from each company. I don't know whether Your Honor is aware but already, two executives of our corporation have been subpoenaed to come to Washington and testify in this matter.

They have already been visited once by the Federal Trade Commission. I am somewhat concerned with the prospect. I might have to bring yet a third witness to Washington to testify about sales figures and in talking with lawyers for AIRCO and with the Federal Trade Commission, it seems to me that they are not that far apart. They are simply running past

EDITOR'S NOTE

Pages 1018 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

order some sort of time period, whether it is ten days, or something other than that which the parties, in effect, might appeal?

JUDGE BARNES: I do contemplate a time period, yes.

All right; thank you very much. I think it is time we move on to another subject matter.

Mr. Thurman, what seems to be the problem with regard to the BOC return on the subpoena?

MR. THURMAN: Mr. Topkis gave us a document this morning in response to our request that BOC be required to comply with the subpoena. I haven't read it yet.

He also turned over some documents pertaining to OEM and Oxyben Equipment Health Industries, but we still believe it is insufficient.

I did glance through this submission by Mr. Topkis. If there is something in the five-year plan that exists, that is relevant. One thing is the five-year plan which we haven't got. I believe I did notice, if they find there is something relevant, that they will give it to us. The time is drawing near. We don't know when he will give it to us.

There is testimony in the investigational hearings that the documents exist, so I don't think there should be any question about whether it exists or not. So all we want now is that plan.

Also, we want sales by product, individual product of

BOC, Fraser, Sweatman and Harris Lake, which we have not received as of this day. This is important in our two markets alleged and proved in these markets.

It is insufficient, and Mr. Topkis keeps pushing for a trial date here but until we get all the discovery material that we need to round out, certainly, we can't. I don't think we should be forced to go to trial here without complete information from respondents.

I don't think that they have made an effort to expedite this trial even though at one point, they were concerned to move forward. Instead of returning the full subpoena herein on the return date, they said, "We will give it to you in a few days."

I don't know how long "a few days" is, but we still haven't got a complete return. As the time draws nearer to the trial date and we haven't got this, there is no way that we could go to trial with incomplete information from respondents.

Other things should be worked out such as sales, et cetera. It will delay the trial, or extend the trial if we have to call in all the people from small companies just to establish their sales.

Mr. Topkis has delayed this. We haven't had sufficient documentation. We know what the sales are, but we don't have sufficient documentation in order to present it to Mr. Topkis to get a stipulation or request the submission of fact.

We have subpoenas out. The return day is on the 25th. This is on medical markets which we hope to submit either as a request for submission of fact as the sales data in these markets after the return date, or try to get a stipulation.

JUDGE BARNES: Complaint counsel does have a large number of subpoenas outstanding, now returnable on the 25th of April, I believe.

MR. THURMAN: There is one other thing, Your Honor. We requested a stipulation on admissibility or authenticity of exhibits.

MR. TOPKIS: I am sorry. I didn't hear that.

MR. THURMAN: We requested a stipulation on admissibility or authenticity of the proposed exhibits. This was issued on March 22nd. As of this date, I have heard nothing.

JUDGE BARNES: Don't the rules cover that? They will be deemed admitted.

MR. THURMAN: Not on a stipulation request, or admission of fact, which I don't think we could do, or maybe we could on the exhibits, but this is just a routine stipulation and there again, this is stalling this preparation for trial.

They have listed a witness without naming the witness just so we couldn't know who to talk to, and we don't know who the witness is going to be.

We have to have time to prepare for this trial which

I am willing to go to trial on May 6th as Your Honor stated if we have the full cooperation of respondent's counsel, get all the information so as to make an orderly trial.

So it is things like that that we just haven't got. It is slowing the preparation of this trial.

JUDGE BARNES: You were a little slow in getting your subpoenas to me, too, I might add.

MR. THURMAN: Subpoenas on medical equipment, on the sales data.

JUDGE BARNES: Yes. Do you have your sales data on industrial gasses?

MR. THURMAN: We know what the sales data is. We have gone out and asked the companies to give us a copy of their Bureau of Census manufacturers current industrial reports which usually is acceptable by opposing counsel.

I haven't talked to Mr. Topkis about this. It is usually acceptable in order to obtain a stipulation as to the sales of various companies.

These are not subpoenable as either from the company or from the Government so therefore, we made a request for all the companies which we believe are in this market to supply this to us.

That is the basis for our motion for the protective order to cover this. If the company does not give us this, the only alternative we have is to issue a subpoena duces tecum when they testify and bring the books and records to the courtroom, and give Mr. Topkis a chance to examine the records.

JUDGE BARNES: There are 61 witnesses. Do you intend to call all of those witnesses?

MR. THURMAN: That depends on what type of stipulation or admission request is to be determined, whether to get a stipulation, or what type of answer we get from a request, or an admission of fact as to sales figures, whether we talk to a good number of these witnesses for sales figures only and no other substantive testimony.

JUDGE BARNES: How are you going to get a stipulation unless you get from Mr. Topkis some figure from which he can stipulate?

MR. THURMAN: I agree. I can't ask Mr. Topkis until I get these figures, and we know what plant was usually considered, what the figures were but certainly, we would want to see something to back that up, not just get my word for it. That is what we are trying to get now.

JUDGE BARNES: From whom are you trying to get it?

MR. THURMAN: On industrial gasses. We have asked them to send us a copy of the Bureau of Census reports which report industrial gas through their monthly reports to the Bureau of Census which is not subpoenable so all we do: we ask them, or request that. If they don't comply, they would have to bring their books and records to trial on the medical products.

That was the subject of the subpoenas that were issued which were returned December 25th. Certainly, as soon as we get a return date on this, we will use this material, and let Mr. Topkis see it under this protective order, if Your Honor issues this protective order, and try to arrange for stipulation.

But we have to act as fast as we possibly can on this. There has been Mr. Topkis' suggestion that, on his moving, this trial be commenced. He wanted April 1st. By April 22nd, we should be completely ready for trial even on an expedited basis.

We are doing everything we can to expedite in this fashion and certainly be prepared, in an orderly fashion, to proceed in this trial.

Mr. Topkis says, on the one hand, that he is ready for trial, ready tomorrow. On the other hand, he says he is going to need certain documents. I don't see how he could be ready if they need these documents.

We certainly need these documents. That is what we have been talking about all along. If he wants to knock off his discovery, fine. I think, then, we should proceed, on short notice, to trial here, set a trial date but otherwise, I don't see how we are going to be able to go to trial, or how Mr. Topkis could go to trial.

I don't see how we could be able to go to trial until the documents are turned over on both sides and from third parties.

JUDGE BARNES: Complaint counsel has a group of subpoenas. I will set another prehearing conference for April 25th.

Mr. Topkis, I suggest that you complete your return to the subpoena before April 25th and if there are any outstanding conflicts, that you have a witness here whom complaint counsel can question as to what kind of search was made, and why certain figures weren't produced.

MR. TOPKIS: Your Honor, I will be delighted to do that, of course, but may I just respond very briefly to some of Mr. Thurman's comments.

First, Mr. Thurman spoke of a request for admission of facts as to sales figures that he has asked of us. I haven't gotten it. If it has been given to anybody, it hasn't been given to me. I will consider it when we get it, of course.

So far as a request for the admission of facts is concerned, we have responded to that. That is taken care of. He carped a little bit about my witness list, identifying companies, not individuals. There is one company I identified: Stanford Research Institute, our expert.

The reason for identifying the particular witness is that with expert think tanks like Stanford Research, you take the one they give you, pretty much, and we don't know who it is going to be as yet.

But in any event, it is not going to talk with Mr. Thurman, I am reasonably confident, in advance of the trial. I don't know of any experts who would do that. She had not heard.

Next, he said that I hadn't responded to his request for stipulation as to documents that they propose to offer. I am prepared to make that response right now. We will stipulate as to any documents obtained from AIRCO'S files, or from BOC, that those documents are authentic; that in each case, a document which appears to have been sent by somebody, was sent by that person; that in each case, a document which appears to have been sent to somebody, was received by that person on or about the date appearing on the document.

I will not stipulate that any document is admissible. I think my position on that should abide by the trial and on the issue which it is offered. I have no idea what Mr. Thurman is going to offer some of his documents on and so far as documents coming from third parties are concerned, I am not going to stipulate that they are authentic. I haven't even seen them, to begin with, but I am not going to stipulate blindly.

Finally, I would serve a caveat in language as bluntly as I can. Namely, that I think I have done everything that can reasonably be asked, accomodating counsel by way of making discovery, by way of stipulating, et cetera.

I haven't seen progress in that direction from the other side, and I want reciprocity. I am stipulating, but I am going to ask Your Honor to be relieved of any stipulations I have now offered unless I get reciprocity. I think I would be entitled to such relief.

Now, Mr. Thurman spoke about two items to which we haven't responded yet on his subpoena. One was the five-year plan. We haven't been able to find it. It is true that the Chairman, Mr. Leslie Smith, testified that he had seen one. If he did, God bless him, we haven't been able to find it as yet. We are continuing to look and as soon as we do find it, if it exists, it will be turned over.

Now, so far as the product breakdown is concerned, sales by our two subsidiaries, Fraser, Sweatman and Harris Lake, that was never asked for. That is why we didn't produce it and now that it has been asked for, we are compiling it. We are going to produce it the minute it is ready. I should certainly expect within the next week or two but as soon as it is ready, it will be presented to you.

I only hope we get from the other side that kind of cooperation. The score is now thousands of documents to zero. Thank you.

MR. THURMAN: I don't know what Mr. Topkis is talking about. I want to have the privilege of talking to his expert. I haven't tried a case yet that I didn't talk to the expert witness of the respondent.

I don't know whether Mr. Topkis has practiced down here or not, but in every individual case, the Judge's order can make the witness available.

Certainly, we are not trying this case as nonpublic any more. We certainly want to know what this man talks about before he gets on the stand.

Secondly, as far as their answer to the request for the admission of facts is concerned, I wasn't going to make an issue. All I am going to do is make another quest for the admission of facts.

I think Mr. Topkis is playing a little game. I don't know what the largest, or leading company meant. It is very clear to me, and I think it is very, very clear to the largest, or leading company that we have to go back out on another quest for the admission of facts.

JUDGE BARNES: Make your requests a little more specific. Largest in what, product sales, cubic feet?

MR. THURMAN: Maybe we are a little more delinquent, but it is the leading company. It certainly knows that we are talking about

JUDGE BARNES: Ask him about shipments.

MR. THURMAN: As far as reciprocity is concerned, I don't know what Mr. Topkis is talking about there, either.

JUDGE BARNES: We have to make some progress. We have to get sales figures in. I hope that they can be stipulated. I hope we don't have to parade 60-some witnesses in here just to get sales figures.

It seems to me that it would be a waste of everybody's time. What progress can be made by sales figures on stipulations when you don't even have them?

MR. THURMAN: I don't think there is any point in discussing the subpoena for each product we asked for. It is there in black and white.

JUDGE BARNES: We will have a prehearing conference on the 25th of April. I will issue an order setting the time and the room. I hope that the BOC subpoena return has been completed. If not, we will take it up at that hearing also.

There may be returns on complaint counsel's subpoenas. I don't know how many will return the documents without appearing, or how many will appear but in any event, we have to set a prehearing for a date.

MR. THURMAN: There are two more things which I would like to bring up, if I may.

JUDGE BARNES: All right.

MR. THURMAN: One thing: if we are definitely going to trial on May 6th, I would have to know shortly because I have to get out subpoenas for witnesses. I have to have ten days' notice.

JUDGE BARNES: I am prepared to go on May 6th. I am prepared to start here in Washington, D. C., or New York. As I look over the list, it seems there are 20 who might be called in New York.

MR. THURMAN: Our witnesses?

JUDGE BARNES: Yes.

MR. THURMAN: I didn't intend to go to New York for any of our witnesses.

JUDGE BARNES: You said we would go. There are BOC officials.

MR. WADE: And AIRCO officials.

MR. THURMAN: I wasn't present at the first pretrial conference. I don't think they have any business for moving the defense to New York. You certainly don't go up there for mediation, counsel. These officials aren't located in New York.

I think it would be more appropriate to have the trial where we have a group of witnesses but certainly, not New York City.

MR. TOPKIS: Mr. Thurman, the rumors of being a high crime area are highly exaggerated. There is nothing to be so terrified of.

MR. THURMAN: I am not terrified of New York City, but the trial should be here unless there is a compelling reason to move to some other location. There is no compelling reason, that I know of, to move this trial to New York.

MR. WADE: That matter was discussed at length during the first prehearing conference on behalf of AIRCO. I have seen the transcript of it, Mr. Thurman. I am sure that we, AIRCO, have no reason to change the ground rules at this late date.

JUDGE BARNES: It seems to me, looking down the list, that there are witnesses from Massachusetts; Allentown, Pennsylvania; New York City; Boston; Allentown; Hudson; New York City; Murray Hill, New Jersey; Rutherford, New Jersey; Providence, Rhode Island; Cambridge, Massachusetts; Lennon, New Jersey; New York; Niagara, New York; Edison, New Jersey; Edison, New Jersey; New York City; Eaton, New Jersey.

There are about 20 witnesses for whom it would be more convenient to have the hearing in New York City, would it not?

MR. THURMAN: No.

JUDGE THURMAN: It would not?

MR. THURMAN: No, it would not. With today's transportation, it takes them just about as long to get here as it would to get to New York. There is no reason why this trial should be, in my opinion, moved to New York.

I certainly don't know the order of their being called, that these people would be located there. I believe that there has to be some justification made by respondent, to say: "We would like to have the trial in New York, the corporate headquarters."

I think that is the only reason you can move it there.

JUDGE BARNES: Did you list any witnesses from AIRCO and BOC?

MR. THURMAN: BOC witnesses are not located in New York.

JUDGE BARNES: Where are they listed on the witness list?

MR. THURMAN: We didn't list them by name. We listed by respondent, witnesses to be called by respondent.

JUDGE BARNES: The understanding that we had was that we would hear the corporate officials in New York, both in the case in chief and in defense.

MR. THURMAN: That wasn't my understanding. I would certainly like to move, at this time, that Your Honor reconsider. I don't know whether there was an objection by complaint counsel at that time when this was raised.

MR. TOPKIS: There was agreement.

JUDGE BARNES: That is what I thought.

MR. TOPKIS: Mr. Youngwood said, on behalf of complaint counsel, in the event that we would determine that it would be preferable to have that part of the case in chief, to accommodate the examination of the BOC and AIRCO officials in New York, then we can accept that.

JUDGE BARNES: That is what we will do. We will have the corporate officials in New York.

MR. THURMAN: Your Honor, inasmuch as I make an appearance after that date, I suggest that there should be some ground for these witnesses to be heard in New York City.

JUDGE BARNES: We discussed that before.

MR. THURMAN: We have seven or eight people on this case who will be going to New York and certainly, it is more, I think, economically speaking, better to bring the witnesses to Washington.

JUDGE BARNES: I am not requiring you to take seven or eight people up there for these hearings. I have never tried a Commission case in my life when I had seven or eight people up there.

I understand that they are short of travel funds, though. In any event, we will hear the corporate officials in New York City, and I would suggest that for Dr. Leslie Randall-Baker from New York City, perhaps, it would be more convenient for him to hear him in New York City.

Also, I think that we should consider the convenience of people like him in scheduling hearings but that, I will leave to your own discretion. We will hear the corporate officials in New York City in the case in chief as well as in defense.

MR. THURMAN: Your Honor, certainly, we would take into consideration a request from any witness who may want to be heard somewhere else. We haven't had such a request.

MR. TOPKIS: Witnesses have a way of not making requests unless they know that the request is a possible one. We will try to write to all the witnesses on the Commission's list and advise them.

JUDGE BARNES: I don't suggest that at all.

MR. THURMAN: I don't know whether it is true or not, but I was told that Mr. Topkis has been telling everybody that the trial would be in New York.

MR. TOPKIS: That is not the fact. I have told nobody that. As a matter of fact, I haven't talked to many people, about three. What fantasy!

JUDGE BARNES: We agreed earlier, and I am going to order it now, that we will have the trial in New York for the corporate officials of AIRCO and BOC.

I am suggesting to you that you consider calling other witnesses to the New York area, but I will leave that up to you.

MR. THURMAN: In all due respect, may I ask for the justification for respondent's witnesses to be called in New York City?

If you are going to go that far, you might as well go to London if that is the only justification. To bring them clear across the sea to pick another city away from where the trial would be conducted has no justification whatsoever in my mind.

JUDGE BARNES: Well, my ruling has been made, and we will stick by it. Is there any other matter?

MR. WADE: Your Honor, when we reconvene on April 25th, could I make a request that at that time, complaint counsel give us the order of witnesses and the approximate amount of time he expects to take of each witness during the trial commencing May 6th so that we may have adequate time to prepare and schedule our own cross-examination of those witnesses?

JUDGE BARNES: I suggest that you make your motion on the 25th. I will see how far along trial preparations are, if we are going to have to give you prior notice of the scheduling.

MR. WADE: Okay.

MR. TOPKIS: Could I raise one point? In part, because we haven't gotten any documents from the other side, we are unable to comply with Your Honor's directive that we list, for complaint counsel, the documents that we propose to offer as part of our case in chief.

You had directed us to do that by tomorrow. I confess that we can't do it for that reason.

JUDGE BARNES: You don't have any documents that you can list?

MR. TOPKIS: What I am trying to tell you: In truth, to pare down from the universe to a relative few, I could do that much more effectively if I could have another week in which to do it and, of course, then identify any documents that I may get from the other side.

JUDGE BARNES: Have this prepared by the 25th.

MR. TOPKIS: Very well. Thank you.

MR. THURMAN: Well, Your Honor, I don't believe that even one time in this case have they been on time yet. Yet, they push for an expedited trial. I don't understand that procedure.

Secondly, we were ordered to give a list of documents by today, and additional witnesses. I would like to ask, in light of the fact that they had not supplied the list of additional documents until we got some just now, and we did get some previously, but it is still not complete, would Your Honor desire that we furnish a second list of exhibits today?

JUDGE BARNES: By the 25th, furnish them.

MR. THURMAN: We had two witnesses whose names we inadvertently left off the other list. We will file the witness list today and on the 25th, the exhibit list. Thank you.

JUDGE BARNES: Mr. Thurman, do you have any consultants? Are you going to utilize any staff economists?

MR. THURMAN: Staff economists?

JUDGE BARNES: Or anyone who will be a consultant in your case.

MR. THURMAN: Yes, we have two staff consultants. I don't believe they are going to testify unless it would have to be rebuttal.

JUDGE BARNES: Do you have expert witnesses who are going to testify?

MR. THURMAN: We do have experts who are listed on the hearing witness list.

JUDGE BARNES: Are the medical men expert or market witnesses, or both?

MR. THURMAN: They will be experts.

Your Honor, there is one other thing. I don't know whether to raise this or not. Mr. Topkis has told me that he is going to raise the question of jurisdiction in defense. May we ask that it be struck.

JUDGE BARNES: The answer?

MR. THURMAN: The portion of the answer with regard to the first offense: FTC did not have jurisdiction.

JUDGE BARNES: Did he state that he was not going to raise that question?

MR. TOPKIS: That is correct. As the British companies that are involved here, we agreed to be bound by whatever order Your Honor may enter.

MR. THURMAN: Number 27 of the answer states that the Federal Trade Commission lacks jurisdiction over BOC Holdings and BOC Investments.

JUDGE BARNES: It is not necessary to strike it if Mr. Topkis has waived it.

MR. THURMAN: I agree with that.

JUDGE BARNES: Is there anything else which we can discuss profitably at this time?

MR. TOPKIS: We have nothing, Your Honor, except our thanks again.

MR. THURMAN: We have nothing else, Your Honor.

JUDGE BARNES: All right. Let me encourage you to try to expedite. Let's move this case on May 6th. At least, have a couple of weeks of hearings. If it turns up that you need additional time for sales figures or market information, you can adjourn for a week, but let's start on May 6th and move some of these witnesses along.

You have a large enough staff so that some of you can attend the trial and others could be out working out charts, or whatever you have to have.

MR. THURMAN: Yes, Your Honor. We are agreeable to moving on May 6th but with this caveat: that if we don't have the sales figures or the type of information that is necessary, we do have the right to delay the trial.

JUDGE BARNES: We can go as far as we can, and we can stop. I assume that your position is that you will start in Washington. We are going to start with the corporate officials.

MR. THURMAN: If we are being forced to go to New York, they will probably be last.

JUDGE BARNES: They will be last?

MR. THURMAN: Yes.

JUDGE BARNES: All right. Thank you very much, gentlemen.

[Whereupon, at 12:18 p.m., the further prehearing conference was concluded. A further prehearing conference will be held on April 25, 1974, at 11 a.m.]

BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER

of

BRITISH OXYGEN COMPANY, LTD.
BOC FINANCIAL CORPORATION
BOC HOLDINGS, LTD.
BRITISH OXYGEN INVESTMENTS, LTD.
AIRCO, INC.

Docket No. 8955

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Room 332, FTC Building
Sixth and Pennsylvania Avenue, N. W.
Washington, D. C.
Thursday, April 25, 1974

Met, pursuant to notice, at 11 a.m.

BEFORE:

ERNEST G. BARNES, Presiding Administrative Law Judge

APPEARANCES:

GORDON YOUNGWOOD, DON PURCELL, DARYL NICKEL, RHETT KRULLA and JOHN HOAGLAND, on behalf of the Federal Trade Commission.

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022, on behalf of Respondent, BRITISH OXYGEN COMPANY, LTD.

GEORGE J. WADE, R. BRUCE MacWHORTER and DANFORTH NEWCOMB, Shearman & Sterling, 53 Wall Street, New York, New York, 10005, on behalf of AIRCO, INC.

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PROCEEDINGS

JUDGE BARNES: This is a prehearing conference in the matter of British Oxygen Company, Ltd., Docket No. 8955.

It is being held pursuant to my order scheduling a prehearing conference, dated April 17, 1974. In accordance with our previous practice, this will be a public prehearing conference.

Mr. Youngwood, I suggest we first take up your problems of subpoena return of BOC. What is the status of that?

MR. YOUNGWOOD: Your Honor, ---

MR. TOPKIS: Excuse me, Your Honor.

Before Mr. Youngwood remarks, Your Honor, I can complete our production right now.

JUDGE BARNES: All right.

MR. TOPKIS: There has been a request made that we submit information relating to sales by Fraser Sweatman, Inc., and by Harris-Lake, Inc., and I am handing over a verified statement on that subject to Mr. Youngwood.

There has been a request made that we produce any information relating to contacts with an outfit called Oxequip, O-x-e-q-u-i-p, and we have double-checked our files and found these additional documents which I am now handing to Mr. Youngwood.

And we also found minutes of a Board meeting which seemed to possibly come within the terms of the subpoena, in rechecking, and these are minutes of 21 July 1976, I believe, and I am handing a copy of those minutes to Mr. Youngwood.

Finally, Your Honor, there was a request by Complaint Counsel that we produce a five-year projection, which was referred to in Mr. Leslie Smith's testimony on deposition this past December. We have located the document and I have a copy of it in my hand.

But as Your Honor will recall, everybody who spoke up from third parties said last week there is nothing more secret in a company's opinion that its future planning and projections. I am prepared to show this to my colleagues. I would like very much to do it after we recess and, at that time, I am going to suggest to them that very little, if any, of it has to do with this case and I would like to try to work out an arrangement with them whereby we would excise the nonrelevant portions, and as to any portions which we do deliver to them, I would like in Camera treatment.

JUDGE BARNES: At the time you offer it, you mean?

MR. TOPKIS: I am sorry, I would like it to be covered by a protective order, the protective order that Your Honor has directed and I will apply for in Camera treatment should it be offered. If that is satisfactory, that is ---

MR. YOUNGWOOD: Your Honor, I think that would be satisfactory with us as long as they would have no problems with those portions of that five-year plan which we would like.

MR. TOPKIS: No, I have no problem; we will work that out.

MR. YOUNGWOOD: So as I understand it, we will, then, receive a copy of all portions of that plan which we deem relevant?

MR. TOPKIS: That is right, subject to the protective order.

MR. YOUNGWOOD: Very fine.

JUDGE BARNES: If you, Mr. Youngwood, are presented with a problem with what is to be excised, I will be available to meet with you all.

MR. TOPKIS: Thank you, Your Honor.

MR. YOUNGWOOD: Thank you.

JUDGE BARNES: Also, you will be bound by the protective order I entered in the recent motion, as to this document.

MR. YOUNGWOOD: Yes, Your Honor, yes, sir.

JUDGE BARNES: Do you have any remaining problems with the remaining subpoena return?

MR. YOUNGWOOD: Your Honor, we have not yet had an opportunity to examine the material Mr. Topkis has just given us and until such time as we do -- and I will ask two of my associates to examine it -- and until such time as we do, it is not possible for me to answer your question.

JUDGE BARNES: We will proceed while your associates examine this return.

I think we ought to find out today how we stand on this subpoena. We can't keep calling prehearing conferences for a little matter like this.

MR. YOUNGWOOD: I agree. If we can, I am sure we will be able to answer your question before the end of the prehearing. And after examination, I think that we will be able to ask questions of Mr. Laister, and I am sure we, at that point in time, will be able to determine whether we feel the return is complete.

JUDGE BARNES: For the benefit of Respondents, I scheduled the trial to begin on May 6. I don't know if you had been served with a copy or not.

MR. TOPKIS: No, Your Honor. But that had been our understanding.

MR. WADE: We received a copy yesterday afternoon.

JUDGE BARNES: So the formal hearings will begin May 6, at 9:30 a.m.

MR. YOUNGWOOD: Your Honor, excuse me. We have served a subpoena on Mr. Alec Flam for May the 6th and I think that the time was 10:30 a.m.

JUDGE BARNES: I imagine there will be an hour of preliminary matters we can take up.

MR. YOUNGWOOD: Okay, right.

JUDGE BARNES: And we will commence our hearings over in the Star Building at 414 Eleventh Street, and we will be there for six days of hearings, at which time, we may have to move over here and juggle our hearing rooms. I will do the best I can to keep the same room all along. That may cause us some problems.

Complaint Counsel served a group of subpoenaes on companies calling for information on certain markets. They were returnable today. And in the meantime, I have granted three extensions of time to parties who called me on the phone saying they could not make today's return date. So, I will just read you a list of those companies:

Dabol, Inc.; their time was extended to mailing the subpoenaed material on or before April 30, 1974.

Sherwood Medical Industries; their time was extended to mailing a statement on or before April 25, so that would be mailed today and received in a couple days, probably.

And the third matter, NARCO Scientific Industries, was given until May 3 to mail a response.

Just for information purposes, those are the only companies that I have heard from.

Mr. Youngwood, I notice in your subpoenaes that you have not asked for any information on the market shares of Medical, is it medical pipelines, is that one market? Medical pipeline systems? Nor have you asked for any information on the electrical welding, gas welding and cutting markets. What is the status of your information on those companies or those markets?

MR. YOUNGWOOD: Your Honor, I can report that the Complaint Counsel intends to offer no evidence in support of a charge of violations with respect to either of these markets.

JUDGE BARNES: Medical pipeline systems, and electrical welding and gas welding and cutting markets, is that correct?

MR. YOUNGWOOD: That is correct, sir.

JUDGE BARNES: I was going to bring up the question of scheduling of witnesses for the first week of hearings, have you turn over a schedule to Respondents, but I see you have done so this morning.

MR. YOUNGWOOD: Yes, Your Honor, we have. We have given to Airco, Inc., and BOC a copy of a calendar which we will file today. We have not yet filed.

We have also given to Airco, Inc., and BOC a copy of a supplemental exhibit list and we intend to file before the day is out a copy of a list of all additional witnesses which we expect to call. This, of course, would be contingent upon the materials which we find in their submissions today, and anything else which might develop between here and the trial.

But the list which I will file today will contain those witnesses whom we expect to call after the first week.

JUDGE BARNES: For the remainder of your case-in-chief?

MR. YOUNGWOOD: Yes, sir.

JUDGE BARNES: You have already listed some 65 witnesses.

MR. YOUNGWOOD: We have added two witnesses, for purposes of sales only. We have eliminated several witnesses. I cannot tell you the number. We have eliminated several.

JUDGE BARNES: Have you advised Respondents about that?

MR. YOUNGWOOD: Of those eliminated? No, we will, today. We will today serve them with a copy of the list which will contain all those witnesses which we expect to call to testify and those witnesses who will testify with respect only to sales have been designated with an asterisk.

There will be, I believe, 26 or 27 witnesses who will be called to testify in support of our case-in-chief other than the sales purposes.

JUDGE BARNES: Twenty-six or 27 witnesses?

MR. YOUNGWOOD: Yes, sir.

JUDGE BARNES: Are you calling any witnesses -- I guess you are not calling any witnesses on medical pipelines or welding.

MR. YOUNGWOOD: No, sir. These witnesses, the numbers mentioned, would be in addition to any witnesses we would call from Airco, Inc., and BOC. That is also, the number which I mentioned, is a number which I had given off the top of my head. I am not absolutely certain that it is 26 or 27.

JUDGE BARNES: But in any event, by the end of today, you will have notified Respondents of your entire witness list for the case-in-chief, except for information developed here by the subpoena return today?

MR. YOUNGWOOD: We will notify Respondents of those witnesses that we expect to call, all witnesses we expect to call, barring any new developments. But all witnesses we expect to call other than those witnesses from BOC and Airco, Inc.

And I might comment that we will get to them by next Thursday, if this is satisfactory with you and with them, a calendar of the dates and times at which the remaining witnesses will be called, if that is satisfactory.

JUDGE BARNES: What efforts have been made to get stipulations on sales figures? You keep talking about witnesses for sales figures and stipulations. Have you presented Mr. Topkis and Mr. Wade with any proposals for stipulation?

MR. YOUNGWOOD: We do not have a complete return. The sales figures which have come in from the companies with respect to the medical products was due, those figures were due today. I was hoping that we might be able to discuss whether Mr. Topkis might be amenable to accepting as accurate reflections of the sales of the particular products mentioned in our subpoena, the numbers which are furnished to us.

I would hope also that we might be able to get to discuss today whether it might be appropriate for Mr. Topkis to accept as accurate reflections of sales of industrial gas or value of shipments of industrial gas, those numbers which have been submitted to us or will be submitted by third parties.

In the event that he can accept those numbers as the third parties have given them, that would save us a great deal of time at trial.

JUDGE BARNES: Mr. Topkis, what is your feeling on stipulation?

MR. TOPKIS: I am certainly disposed to warmly entertain any stipulation on this subject, Your Honor; but up to now, we haven't seen any figures, we haven't seen any returns so I can't really say.

But I assure Your Honor and Mr. Youngwood that we will be delighted to be as cooperative as we can.

JUDGE BARNES: All right.

MR. YOUNGWOOD: Do I interpret that, Your Honor, to mean that Mr. Topkis will accept ---

JUDGE BARNES: I can answer that now.

It does not mean that he will accept; it means he [illegible]ald like to look at them.

MR. YOUNGWOOD: He would like to look at the sales figures and census figures before determining whether he would accept the sales figures and census information.

JUDGE BARNES: I am sure he wants to see them first.

MR. YOUNGWOOD: He wants to see the numbers before -- would that mean he would like to see the numbers of dollars of endo-tracheal tubes of Sherwood Industries before he will accept as valid the dollar sales of endo-tracheal tubes?

MR. TOPKIS: In a word, absolutely.

MR. YOUNGWOOD: Sir, under those circumstances, then, our only choice in the light of the fact that some of the companies will not be complying in medical and in light of the fact that there may be a difficulty in respect to all census information, our only choice is to attempt to get a partial stipulation, a stipulation with respect to sales of individual companies and we will make every effort to do that.

JUDGE BARNES: Oh, I think you can, you accumulate a group of them. I assume you already have some.

MR. YOUNGWOOD: Yes, we do.

JUDGE BARNES: How many do you have now? How many subpoenaes have been returned to you, verified statements?

MR. YOUNGWOOD: I have been told that we have it, when we walked over here, that we had approximately 15.

JUDGE BARNES: Give them to Mr. Topkis today or tomorrow; when you get some more, give those to him; meet next week and see if you have any problems. Stipulate as to 15 companies.

MR. YOUNGWOOD: WE will be happy to. We will be happy to do that.

JUDGE BARNES: Call witnesses from the other company, agree that certain companies are not necessary for the market.

MR. YOUNGWOOD: We will be happy to do that.

JUDGE BARNES: Stipulate, certainly, go as far as you can.

MR. YOUNGWOOD: We will be happy to do that.

JUDGE BARNES: I notice, Mr. Topkis, in reading your motion for subpoena against the Commission, that you name the companies, you put the name of the companies in the beginning of your motion.

The British Oxygen Company Ltd., no comma. Is that a correct corporate name or is the complaint in error?

MR. TOPKIS: I am informed that that is correct, Your Honor. But I have an expert on the subject present, Mr. Laister.

MR. LAISTER: It is "British Oxygen Company, Ltd." We normally don't use "the" in front of it; just put British Oxygen, Ltd.

JUDGE BARNES: You don't use the "the"?

MR. LAISTER: I don't believe we do, sir.

JUDGE BARNES: Is there a comma in the caption, in the company name?

MR. LAISTER: Is there?

JUDGE BARNES: A comma between Company and Ltd.?

MR. LAISTER: Yes. There would be a comma, yes.

JUDGE BARNES: In that case, we will leave the complaint stand as it is. I want to get the corporate name correct.

I want to suggest to both parties that for all documentary evidence that you intend to offer, that you have identified with numbers, that you prepare a listing, something similar to what Complaint Counsel has already done.

In fact, I think their list now might be appropriate, to offer such a list into evidence, merely for identification of the documents. In other words, we can receive one exhibit in the record for identification purposes and it will save us 100 pages of transcript.

MR. TOPKIS: If Your Honor please, then, we have prepared such a list, if I may approach the Court.

We served it on the other side and I think that would comply with the suggestion that YOur Honor just made.

JUDGE BARNES: All right, at the appropriate time, offer this in the record as an exhibit for identification purposes. Complaint Counsel can do the same.

MR. YOUNGWOOD: Your Honor, do you feel it might be appropriate for the Respondents to state paragraphs of the complaint to which the particular exhibits relate, or do you feel it might be appropriate for them to state whether these exhibits relate to their only remaining affirmative defense, which is one of latches?

JUDGE BARNES: I don't think there has been a big issue made by either side, to date, as to the relevancy of documents that are being identified, and I notice on your list, you did put the relevant complaint paragraphs. I don't know whether that was very helpful or not.

If Respondents are willing, I would suggest they do the same as you do on your list; show the relevant paragraphs, but nothing further. WE can take up relevancy, materiality, as each document is offered.

MR. YOUNGWOOD: Then, shall I understand that we are not bound by our designation of paragraphs, with respect to those paragraphs which a particular document tends to prove?

JUDGE BARNES: Didn't you reserve in your preface to the exhibit list?

MR. YOUNGWOOD: I believe so.

JUDGE BARNES: Didn't you make a reservation?

MR. YOUNGWOOD: I believe so. I would like to make that clear.

JUDGE BARNES: There have been no rulings issued by me in regard to any document, and unless someone makes a motion I don't intend to.

MR. WADE: Your Honor, I just want to state for the record that we will supply an exhibit list to Complaint Counsel later today.

JUDGE BARNES: Later today?

MR. WADE: Yes, sir.

JUDGE BARNES: You have a lot of photographs here.

MR. TOPKIS: Yes, Your Honor. They are all of very small buildings, and we needed a lot of photographs to show how small they were.

MR. YOUNGWOOD: Your Honor, at what point in time will we receive documents referred to in BOC's exhibit list?

MR. TOPKIS: Approximately 11 a.m. this morning, Your Honor.

JUDGE BARNES: And, Mr. Wade, how about your exhibits?

MR. WADE: This afternoon, I hope.

JUDGE BARNES: I don't get a chance to enter any orders here.

MR. TOPKIS: WE are in a hurry, Your Honor.

JUDGE BARNES: The Complaint Counsel this morning made an additional exhibit list. I believe if you want to turn that over, or you will file that today, well, I have one remaining item.

Is there any additional discovery that either party desires at this time, any subpoenaes or any information that we can get under way?

I might ask Complaint Counsel what is your feeling on turning over the documents that we ordered turned over in my recent order?

MR. YOUNGWOOD: I am glad you mentioned that, sir. We intend to appeal your decision. We will submit a filing in that matter, either tomorrow or Monday. I believe that it is possible that we should discuss whether it might be appropriate for you to stay your order, pending consideration of a request which we will make to the Commission for such a stay.

The reason that I believe that it might be appropriate is that if you do not stay your order, and the Commission does not rule by Tuesday, we will have eliminated any right of appeal which we might otherwise have had, because your order requires us to turn documents over after five days.

The Commission will meet on Tuesday. But if the Commission does not take this matter up before then, then, you will have required that we turn the documents over and the fact that we have appealed will be of no material value whatsoever.

JUDGE BARNES: It is not my intention that you turn the documents over if you perfect an appeal within the five days. We will wait until the Commission rules. So, that is the intent of my order.

But in your appeal, I ask that you file it as soon as you can and I also ask that you begin the appeal with a statement as to the urgency of immediate consideration by the Commission.

I know that they won't consider it on Tuesday. You will be lucky if you get a ruling out of them in 10 days or 15 days. But I ask that you stress the time element in your motion.

MR. YOUNGWOOD: We will be pleased to do that.

Your Honor, there are a few other matters which I thought might be appropriate for discussion, if I might interject.

JUDGE BARNES: All right, go ahead.

MR. TOPKIS: Before we go to those, Your Honor, I am a little bit afraid that unless Your Honor puts some outside time limit on matters, we might find ourselves with -- I think that in order for the Commission to appreciate the urgency of this matter, the best way for it to be presented would be for Complaint Counsel to request a stay from the Commission.

Having been a law clerk myself, I remember how things get burried under piles of papers unless they are brought to the Judge's attention. And I think the most effective way to do that would be -- although I certainly subscribe to and welcome Your Honor's suggestion that preferatory material appear right at the outside of the Commission's brief, but I think it might be even more effective if Your Honor provided that the stay of your order would expire unless extended by the Commission in, let's say, 10 days, or something like that. Then, that would put the monkey on Counsel's back to go get a further stay.

JUDGE BARNES: I don't like to issue rulings setting deadlines for the Commission. I notice they didn't set a deadline for me.

MR. TOPKIS: No.

JUDGE BARNES: And I would prefer to make an oral statement now that Complaint Counsel, if they perfect an appeal need not comply with the order until the Commission rules on your appeal.

This matter of turning over documents is a very delicate matter and the Commission's Rules provide that the Commission may consider an appeal on this subject whether I certify it or not. They want to have the final say on what is turned over.

So, I will just let the five-day -- I gave you five days in my order, so, perfect your appeal within those five-days period. I don't know when it expires.

MR. YOUNGWOOD: We, again, will have the appeal filed either tomorrow or Monday, and we will note, as I suggested, the urgency to which you have referred.

JUDGE BARNES: And I hope,Mr. Youngwood, in the meantime, assuming the Commission affirms at least a part of my order, that you will have these documents in some type of order that you can turn them over without coming in and saying it is going to take you two weeks or a month or something,to pull them out.

MR. YOUNGWOOD: Your Honor, we have seven file cabinets of materials which we have gathered as a result of industry-wide investigation. I, at this moment, have no idea how much of that seven file cabinets is not called for in your order.

JUDGE BARNES: This might be something ---

MR. YOUNGWOOD: You are asking us to take steps which would cause us to expend a great deal of time when we are going to trial in seven working days.

JUDGE BARNES: Mr. Topkis stated on the record here at a previous prehearing conference that on some of these specifications, he doubted if there were any documents produced. And it might certainly be helpful to the Commission if they have some idea of what is involved here.

I think you ought to be able to tell them in your motion how many documents are going to have to be turned over. If you do have responses to certain of the highly confidential requests, you should be able to tell the Commission what you have got or give them some idea what you have got.

Don't just say we have got seven file cabinets full of documents; we don't know how many of them are relevant and how many are not. Maybe none of them are relevant.

MR. YOUNGWOOD: Your Honor, we have stated our position with respect to relevance and we believe that most of these documents are not relevant. However, I think that you are asking us, and I would like to make sure that you understand that you are asking us to perform a large task at this point in time.

We feel that we have a substantial amount of work ahead of us in the next six and one-half days, workdays, before trial starts. To ask us to segregate, and I think that is what you mean, segregate those items which are relevant to the specifications and those which are not, asking us to segregate them at this time, would require a great number of man hours.

JUDGE BARNES: I am not asking you to make a precise determination of each and every document that would have to be turned over pursuant to my order but I think you should have some idea of what is called for or what is to be turned over. You should be able to tell the Commission that.

MR. YOUNGWOOD: We will examine the documents in order to have an idea as to what it is that we are really talking about.

JUDGE BARNES: If the Commission comes down with a ruling that they are going to have to be produced, you are going to have to turn them over on short notice.

MR. YOUNGWOOD: We accept the fact that if the Commission orders that, that they are going to have to be produced; we will probably have to turn them over within a period of about a week.

JUDGE BARNES: All right.

Mr. Youngwood, you said ---

MR. YOUNGWOOD: Actually, when I said "turn over," we will probably have to make them available within that time, anyway.

JUDGE BARNES: You had some problems you wished to discuss, Mr. Youngwood?

MR. YOUNGWOOD: Yes.

Last week, we discussed the witnesses listed on the BOC list and we were told that we didn't have to know the names of some of the witnesses and the reason we didn't have to know the names is because we couldn't see them anyway.

Now, I find that somewhat curious. I would like to ask again that the names be given to us. I am not interested in the fact that Stanford Research is going to testify. They are not; it is going to be an individual testifying.

In addition to that, BOC lists on their witness list all the names listed on Airco's witness list. Airco has listed on its witness list all those witnesses listed on our witness list and there is some, I think you said, some sixty-odd witnesses; a great number of which would be called only for the purpose of testifying as to sales data.

In order for us to prepare adequately, it will be necessary for us to know which witnesses they are going to call; those four, I consider to be somewhat inadequate.

JUDGE BARNES: Any comments on that?

MR. TOPKIS: Yes, Your Honor. I can give our friends our best expectation as of this moment. It is from SRI, Stanford Research; we will be calling Dr. Andrew Kridel; Dr. Robert R. Nathan Associates; we will be calling Mr. Nathan and from the Boston Consulting Group, Mr., or Dr., I am not sure of the honorific, Robert Lienhardt.

That is our current expectation and if there is any change, we will advise our friends promptly.

MR. YOUNGWOOD: Your Honor, can I take that to mean, therefore, that they will call -- that they do not presently expect to call anyone listed on our witness list?

MR. TOPKIS: Oh, that is not so at all.

MR. WADE: That is not so.

MR. TOPKIS: That is not so at all.

JUDGE BARNES: Mr. Youngwood, I don't think you are going to be surprised if he calls or recalls some of your witnesses. You should know what your witnesses know and are capable of testifying about. So to the extent that he finds it necessary to recall some of them, he will tell you in plenty of time.

MR. YOUNGWOOD: Your Honor, we have contacted a great number of these witnesses for the purpose of obtaining sales data, who I have no idea what some of these men may actually say. And I am saying that I have absolutely no idea, especially in the field of medical practice, who Mr. Topkis might deem advisable to call.

And I can honestly say that I will be very much surprised no matter who he calls, because I don't know whom he might call in that field.

JUDGE BARNES: All right. I am going to order the Respondents, by Friday of the second week of trial, whatever date that turns out to be, to give you a firm witness list. It doesn't have to be positively firm but certainly, they have got to let you know at that time whom they realistically expect to call.

And we had a discussion at the last prehearing conference about interviews with experts of either side. It has been my policy to require Complaint Counsel to make their experts available to Respondents for an interview and vice versa. If you want to go out and talk to Mr. Nathan, you should be permitted to talk to him.

If Mr. Topkis wants to be there at the interview, that is up to him. But, also any of your experts that Mr. Topkis wants to interview, he shall be permitted to interview them. You may be there, if you wish.

MR. YOUNGWOOD: Thank you.

MR. TOPKIS: Fine.

JUDGE BARNES: Is that clear?

MR. TOPKIS: Yes, Your Honor.

Just one thing, Your Honor.

I don't mean to be amusing, but we pay these people for their time. Does my friend pick up the tab on the days when he takes up their time?

JUDGE BARNES: No, I don't think so.

MR. YOUNGWOOD: We are somewhat limited in funds, YOur Honor.

JUDGE BARNES: Make your interview brief, Mr. Youngwood.

You had other problems, Mr. Youngwood?

MR. YOUNGWOOD: Yes, sir.

We discussed last week what the attitude of

Respondents might be with respect to the stipulation which we mailed to them on authenticity. My recollection is that Mr. Topkis indicated that he would be happy to stipulate as to the authenticity of any document which was mailed to, or which we received from BOC or Airco.

If I am incorrect on that, I would like to be told that right now, please.

MR. TOPKIS: I think the record is perfectly clear. I said that we would stipulate, as to any document received from either BOC or Airco, that that document was sent by the person who appeared to be the sender, to the person who appeared to be the addressee, on or about the date that appeared to be the date of its transmittal.

As to any other documents, we would be glad to consider stipulation, but as of this moment, we don't know anything about it.

JUDGE BARNES: As of this date, I believe you have only noticed them with B OC, their arguments for the documents, is that correct?

MR. TOPKIS: I think that is probably correct but I am not sure.

MR. YOUNGWOOD: I am sorry, I didn't hear that.

JUDGE BARNES: I said to date, you have only noticed them with your intention to notice arguments you have received from BOC or Airco, is that correct? There are no third-party documents involved to date, are there?

MR. YOUNGWOOD: No.

MR. TOPKIS: I believe there are, Your Honor.

JUDGE BARNES: There are some?

MR. YOUNGWOOD: Did we request third-party documents?

MR. TOPKIS: I believe so.

MR. YOUNGWOOD: Yes.

MR. TOPKIS: In any event, if they did, they did and we are not in a position at this time to authenticate them.

MR. YOUNGWOOD: Unless they were received by, received or mailed to BOC.

MR. TOPKIS: No, no, no. I am trying to be very clear. Anything that was produced in this case by BOC or Airco, we have stipulated and we adhere to the stipulation, that they are authentic; that they were sent by and received on or about the date indicated, to the people indicated.

MR. YOUNGWOOD: Then, they failed to stipulate or refused to stipulate to any BOC documents which we received from other people.

JUDGE BARNES: No, he didn't say that; he said he would consider.

MR. YOUNGWOOD: He would consider. Thank you.

JUDGE BARNES: Any other problems?

MR. YOUNGWOOD: The only other matter I have on my list is a discussion which might ensue with respect to the time table for the trial.

We believe that it might be appropriate to have a two-week hiatus at the conclusion of our presentation of our case-in-chief, at which time we would be ready to carry on with our burden with respect to the Respondent's case-in-chief.

MR. TOPKIS: I say, Your Honor, that the length of any hiatus might be determined when we see where we stand at the close of the case-in-chief. I certainly would not be adverse to a brief interruption, but whether it should be two weeks or three days, I think could best be decided then.

JUDGE BARNES: Yes. We will leave that flexible but I understand the necessity for a brief hiatus.

MR. YOUNGWOOD: Thank you, Your Honor.

The only other item which we feel is significant at this time would be the examination of Mr. Peter Laister and I think it might be appropriate before such examination occurred if we can have a five-minute recess so I can discuss with my associates the production of documents which has just come in.

JUDGE BARNES: All right. Does Mr. Topkis or Mr. Wade have anything to bring up before we get to the witness?

MR. WADE: We have nothing, Your Honor.

MR. TOPKIS: Just a couple of things, Your Honor.

In your protective order, appended to your decision on our motion for a subpoena, I think you used the word "lawyers," and I just, perhaps in an excess of caution, I would hope that we would be permitted to deal with our secretaries as we usually do and let them have access, subject, of course, to the same limitations as applied to the lawyers in our office.

JUDGE BARNES: Yes, I think the order should be amended to permit that.

MR. TOPKIS: Okay. I don't think we need redraft it, or anything like that. I would just like that understanding on the record, if I may.

JUDGE BARNES: You may have it.

MR. TOPKIS: And just one other point, YOur Honor.

You direct us, I think, not to make copies. And I think in a case like this, it is entirely likely that for internal purposes, since there are three or four of us working on the case, it would be extremely useful to us if we could make two copies of any document that we thought appropriate, subject to the same condition that we returned at an appropriate time.

I am just thinking we might want to mark them up, cut them apart, or whatever.

JUDGE BARNES: All right.

Let's leave that until such time as the Commission rules and, then, I will certainly consider it.

MR. TOPKIS: Okay, fine.

MR. YOUNGWOOD: Your Honor, there is one other point which I neglected to realize and I think I can comment in a way which might explain the manner in which we are going to prove the inhalation therapy market. I think this might be an appropriate way to do that. We hope to prove a market which will consist essentially of the products contained in their responses to our subpoenaes which we mailed to medical people.

These products will constitute products or accessories which are used to assist or control breathing. And this is basically the market which we will prove in the presentation of our case-in-chief.

JUDGE BARNES: I take it the Respondents have a copy of that subpoena, or that market breakdown?

MR. YOUNGWOOD: Yes, we have furnished the Respondents with copies of all specifications and instructions which have been offered to YOur Honor for signature.

JUDGE BARNES: All right.

Take a five-minute recess.

XXX (A brief recess was taken.)

JUDGE BARNES: Mr. Youngwood, do you have any pertinent relevant questions to ask in regard to the subpoena return? I mean, this is not an examination for purposes of your case-in-chief; it is to inquire as to the return made on the subpoena.

Do you have anything you wish to question the witness on?

MR. YOUNGWOOD: Yes, Your Honor, yes.

JUDGE BARNES: All right, do you have a witness?

MR. TOPKIS: Yes, Your Honor.

Mr. Peter Laister is here. Peter, I think you want to sit there and be asked to raise your right hand.

XXX - -

PETER LAISTER was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

JUDGE BARNES: Give your name and address to the Reporter.

THE WITNESS: My name is Peter Laister and I am a Director of the British Oxygen Company, Ltd. And I am Chairman of BOC Financial.

XX DIRECT EXAMINATION

By Mr. Youngwood;

Q Mr. Laister, can you tell us how long you held the position of Director of BOC, please?

A Yes, since 1969. I think it was 1969, yes, four or five years.

Q Are you familiar with the record retention practices and procedures of BOC?

A Yes, I am.

Q Do they have any routine procedures for record retention?

A No. If you mean record retention, if you mean correspondence, rather than physical data, then, normal procedure, in fact, is that each person in authority has his own filing system. We don't have any corporate, total, central filing system.

Q Can you tell me what the record retention schedule might be for sales information?

A It is kept in the division concerned and it varies somewhat from division to division, so that I can't answer that question in detail.

Q WEre you involved in the submission of documents made by BOC pursuant to a subpoena duces tecum issued by Judge Barnes on March 13, 1974?

A Yes, I was.

Q Will you explain the nature of your involvement, please?

A I was in London when the subpoena was received and I held discussions with our Company Secretary, Mr. Alan Leslie, and with Mr. Bosonnet. And we organized that between the two of them, they, in fact, would carry out the detailed action involved in the subpoena by checking again with the divisions concerned and the people concerned.

Q Will you synopsize your instructions to them, please?

A Yes, to follow out the written letter of the instructions completely.

Q Who was it that determined what documents were actually requested under the subpoena? Was that your job?

A It wasn't by personal judgement of the documents; there were too many documents. But the judgement was left to Mr. Leslie and Mr. Bosonnet jointly in conjunction with the divisional executives involved, who, of course, knew the detail of the business concerned. So that it was, in fact, really a combined effort of a number of people who were trying to provide the information that you requested.

Q But there seemed to have been several interpretations made of the subpoena specifications.

My question really related to who it was that made those interpretations. Was it your interpretation which decided, for instance, that you had not been asked for a breakdown by a particular product or was this possibly made by one of the other gentlemen to whom you referred?

MR. TOPKIS: I am sorry, I am a little lost.

Could we know exactly what Counsel is referring to?

JUDGE BARNES: Restate your question, Mr. Youngwood.

MR. YOUNGWOOD: Surely.

By Mr. Youngwood:

Q The first submission made by your company relating to sales of particular medical products failed to include within its scope sales of respirators, for instance, failed to include its sales of ventilators, it failed to include anything more narrow than hospital equipment.

Was it your determination that that is all we required?

A No, it wasn't by personal determination. But the specification which you just mentioned was not, in fact -- as I recall it requested no such detail. You subsequently sent us, in fact, a list which we would never have dreamed of making up on our own part.

Q That is what I am getting at, sir. The specification asks for sales of each product sold and my question is who it was who determined that sales of each product sold meant just sales of hospital equipment, for instance?

A I don't think that anyone person made such a decision. But we gave you the information and it was generally discussed in the way that we thought that you wanted it, in sufficient detail. We certainly would never have dreamed, in fact, we didn't have available, much of the very tiny detail that you subsequently requested.

Q What documents are available setting forth sales of each product by calendar year for Fraser Sweatman, Inc.?

A For Fraser Sweatman, Inc.?

Q Yes, sir.

A Fraser Sweatman, Inc., now operate on a fiscal year, and so there are no single documents available setting forth the data on a calendar year, at least to my knowledge. We operate the BOC group through a fiscal year which begins in October and ends in September and our whole accounting system and data collection system is on that basis for the Company and all its subsidiaries.

Q Do you have quarterly reports, sir?

A Yes, we do. But they relate to quarters of that fiscal year, and not quarters of the calendar year.

Q Do you have monthly reports?

A Yes, we do have some monthly reports. In most cases, we have monthly reports, but not in the sort of detail you were asking about earlier on.

Q So that the only way you can comply with the terms of the subpoena with respect to Fraser Sweatman, Inc., is to submit invoices?

A We would have to collate all the invoices and add the numbers up from those, as I understand it, yes.

Q Earlier in the week at the request of Mr. Topkis in an earlier submission so that we might be able to handle any problems that would arise without filing a motion, and for other reasons which were mentioned in his earlier submission, I contacted Mr. Topkis and I explained to Mr. Topkis that we would be happy to accept only two years' invoices, rather than four. And, has this been conveyed to you?

MR. TOPKIS: I imagine that that would constitute a communication between Mr. Laister and myself and we occupy a rather special relationship.

MR. YOUNGWOOD: You don't with Sweatman, sir?

MR. TOPKIS: But the fact is no, it has not been communicated to Mr. Laister.

MR. YOUNGWOOD: I had presumed that in Mr. Topkis' desire to handle everything openly, above-board, in an expedited manner, that he wouldn't be concerned with that particular type of communication, in this instance.

THE WITNESS: I ----

MR. TOPKIS: Excuse me, Mr. Laister, I will defend myself.

I don't understand this.

JUDGE BARNES: There is no question pending yet.

By Mr. Youngwood:

Q Mr. Laister, you do have monthly reports. You also have invoices as they relate to our subpoena. WE have called for all documents.

MR. TOPKIS: As they relate to what?

By Mr. Youngwood:

Q We have called for sales, set forth, sales of each product. Do you have invoices which set forth sales of products of Fraser Sweatman, Inc.?

A I could not answer whether or not we have got such documents, which would give such detail as you are requesting, readily available over the last two years. If we did have, then, it would take a great deal of time to collate them and produce them.

Q To produce the invoices, sir?

A I would have thought so.

MR. TOPKIS: Excuse me, Your Honor.

If Mr. Youngwood wants our invoices, he can have our invoices. We are not holding anything back. It never occurred to me that he would want to start tabulating an awful lot of invoices.

JUDGE BARNES: Mr. Youngwood, is it going to be essential to your case that you have calendar information? How precise are these sales tickets going to be?

MR. YOUNGWOOD: Your Honor, we have received returns as I have indicated. I have been informed from 15 companies. Any number of those companies have fiscal years. Every one of those companies has been able to respond, I have been informed, by calendar year. I find it somewhat preposterous that this exception would arise here.

However, we have been able thus far to compute data on a calendar year basis.

If Mr. Topkis wishes to stipulate that sales to Fraser Sweatman, Inc., in the categories we mentioned, or any particular figure for the calendar year, then, we do not need invoices. But if he wishes to stipulate that sales are as reflected in any one of these years, that is fine. Our figures may not be absolutely precise but it is diffuculit to draw accurate market share data when the only company who will not give us calendar year materials is the Respondent. This is the information I have, that thus far, every other company has complied.

JUDGE BARNES: Let me suggest that you request of Mr. Laister such monthly reports as he has, such quarterly reports as he has, for the products, for the two years, and you take

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those figures and make your calculations. And if Mr. Topkis will not stipulate, he wouldn't have to stipulate, I will find whatever the document shows.

MR. YOUNGWOOD: All right. We will be happy to accept such monthly. I will ask the question.

By Mr. Youngwood.

Q Will you provide such monthly reports and quarterly reports which will reflect the information called for in our subpoena?

MR. TOPKIS: We will to the degree that they do.

JUDGE BARNES: To the degree they exist?

THE WITNESS: Yes. Could I know for which two years, precisely, sir?

By Mr. Youngwood:

Q Sure; 1972 and 1973.

A Calendar years?

Q Yes, sir.

A WE will be happy to do it if it would help.

Q Pardon me?

A I say, we will be happy to do everything we can to help here.

Q Thank you.

JUDGE BARNES: I don't think it should be necessary to go and tabulate 40,000 invoices. I don't think we have to have information that precise.

MR. YOUNGWOOD: We all appreciate your comments.

JUDGE BARNES: You may think differently now; I am just giving you my ideas.

MR. YOUNGWOOD: No, sir, if these are your thoughts, then, we are all in accord.

JUDGE BARNES: My thoughts may be all wrong.

MR. TOPKIS: Your Honor, I should perhaps point out that the difference between calendar year figures and fiscal year figures is going to be trifling in any event, because after all, we are dealing with an on-going company. But if we have to go through this, we will.

JUDGE BARNES: That is up to Mr. Youngwood now, if it is not going to be too great a burden on Mr. Laister.

THE WITNESS: I will check, sir, and report back through Counsel to Mr. Youngwood, if I may.

JUDGE BARNES: Thank you very much.

MR. YOUNGWOOD: Thank you, sir.

By Mr. Youngwood:

Q Mr. Laister, we have had furnished to us BOC standard JOCA file, which file is said to be the summary of a five-year strategy plan which was shown to Airco, Inc., on July 25, 1973. Is that, in fact, the summary -- I will show it to you -- for your group ---

JUDGE BARNES: He will bring it to you, Mr. Laister.

THE WITNESS: Oh, sorry.

(Mr. Youngwood handed a document to the witness.)

THE WITNESS: Yes, without checking each sheet, that looks like the complete document that we showed to Airco, Inc., last July.

By Mr. Youngwood:

Q Thank you.

Is this document a summary of a five-year strategy plan, sir?

MR. TOPKIS: It is whatever it is.

MR. YOUNGWOOD: I didn't hear Mr. Laister's answer, sir.

MR. TOPKIS: I was doing my best to object.

JUDGE BARNES: Yes, I think that is an objection and I think the document speaks for itself. This is the document you subpoenaed?

MR. YOUNGWOOD: No, sir. No, sir, this is one of the documents we subpoenaed. I have no objection to going into the other documents that are subpoenaed but this is one of the documents we subpoenaed. If this is a summary of it, then, why don't we have the plan?

This is one of the documents subpoenaed. We subpoenaed documents which contain, provide or set forth, five-year strategy plans and summaries and evaluations thereof, of the nature referred to by BOC Chairman Leslie Smith during the investigational hearing of December 19, 1973.

I didn't hear his answer, but I presume this is a summary.

MR. TOPKIS: That is the document?

THE WITNESS: That is the document that was referred to by Mr. Smith as being shown to Airco, Inc., in July.

By Mr. Youngwood:

Q Let me repeat what I said, sir.

We subpoenaed documents, plural, which contain, provide or set forth five-year strategy plans and summaries and evaluations thereof, of the nature referred to, by BOC Chairman Leslie Smith.

Are there any other documents similar to this? Are there any complete documents, five-year strategy plans?

A There are earlier ones. But I believe that represents -- I am afraid I can't answer that question. I am not sure if there are earlier ones, and I am not precisely sure where each page of that document was obtained from putting it together when we gave it to Airco, Inc., last July.

MR. TOPKIS: But so that there may be no misunderstanding, Your Honor, that was the entirety of the document that was given to Airco, Inc., last July, which was referred to in Mr. Smith's testimony, and which was subpoenaed. We have now produced it. There are no others.

There was nothing else given to Airco, Inc., on that occasion. That is the five-year plan.

MR. YOUNGWOOD: Your Honor, I think possibly Mr.

Topkis is somewhat confused.

It states here the witness said we did produce a summary of the five-year strategy. Those you already have. This is a summary, that is all it is. That is what we were told that this was. If this is something other than a summary, I would like to know. This is the entire five-year strategy plan.

By Mr. Youngwood:

Q Can you tell me if this is the entire five-year strategy plan?

A It certainly isn't an entire five-year strategy plan for the whole BOC Group. There are hundreds of documents produced all over the world which go into making up that summary, which is a distillation of all of the plans of the Group. But it does represent the Group summary strategy plan.

Q Then, there is no narrative report?

A I can't say that there is no writing attached to some of those documents that are put into our central group strategy office. But nothing else was produced or shown to Airco, Inc.

Q I understand that, sir. But our specification 2 refers to documents which contain, provide or set forth, five-year strategy plans and summaries and evaluations thereof, and, then, we say prepared, dated or received during the period 1967 to date.

As I understand it, there may very well be other plans, or there may be narratives which are related to these numbers, which are in here, which we don't have.

Is it true that there are other plans of this nature, from 1967 to date?

A Yes, I believe there would be earlier group summary plans.

Q Is it true that there is a plan, of which this is merely a summary, for the gases division, say?

A For the Gases Division in the U.K., or the Gases Division in Australia, or the Gases Division in New Zealand, yes. I would have to check, I think, to be able to answer that question more explicitely than that.

Q Are there any plans which relate to the particular proposals that BOC might have or the particular plans BOC might have with respect to expansion into North America?

A No, sir, those you have had.

Q Are there any plans which mention any desires by BOC to enter?

A We have been through our plans as carefully as we have been able to in the time that we have had, and we have extracted and given to you every piece of paper which relates to our North American interests.

So that the other document and the documents and the other papers refer to the BOC Group interests, generally speaking, around the world.

Q Let's get back to the plan itself, of which this is a summary. What type of information, what type of ---

MR. TOPKIS: No, no, no.

THE WITNESS: That is not a summary of a plan.

MR. TOPKIS: That is the whole confusion here; this is not a Reader's Digest version of a larger document.

MR. YOUNGWOOD: Then, the Chairman was incorrect, sir.

MR. TOPKIS: No, the Chairman was not incorrect.

MR. YOUNGWOOD: Then, what did he mean when he said a summary?

JUDGE BARNES: Mr. Youngwood.

By Mr. Youngwood:

Q Of what is this a summary?

A That particular document was put together from information in our group strategy office, specifically, to provide a background of data for Airco, Inc., when we had our discussions with them in July.

We have been through those other documents, and insofar as they relate to North America, you have had them. But without going through each page, I would find it quite impossible to tell you where the inforamtion from each page has been curried from.

Q Can you tell me the meaning of JOCA, please? This is designated standard JOCA file. What does JOCA mean?

A I think it is the -- may I look?

I think it is just the sort of ordinary file number. I think it is put on by the people who make the file.

JUDGE BARNES: Bring it over to him and show it to the witness, Mr. Youngwood.

MR. YOUNGWOOD: Okay.

THE WITNESS: Oh, JOCA, it is the name of the people who make the file, I think.

(Laughter.)

MR. YOUNGWOOD: Thank you.

By Mr. Youngwood:

Q Does BOC have periodic budget plans prepared?

A Yes, we do.

Q How do you segregate the plan? Do you segregate it by division, is your budget prepared by division, or ---

A Yes, it is prepared by each of our divisions and each part of the division prepares its part of the plan, which, then, contributes to the divisional plan, and, then, that is amalgamated into a central, corporate summary, such as is represented on some of those sheets you have there.

Q Do you also have a marketing plan?

A Not separately.

Q Separately, from what?

A Not separately from the divisional plan. The divisional plan includes the numbers, and any comment that the division wants to make on those numbers. But there is no set marketing plan.

Q Have you examined the budgeting plans to determine whether there were any comments therein which related to any possible desire to expand into the United States?

A Yes, we went through all our papers and the budgets were dealt with in the same way as the correspondence.

Q Have you examined the business forecasts?

A Yes, in the same way.

Q Strategy plans?

A Yes, all of the files were examined.

Q I have before me a document which we received from you; it is entitled InterMed Progress Report, 1973, and we have designated it as CX-274, and I will show it to you, if I may.

(He handed it to the witness.)

A Yes.

Q Can you tell me what that is, please?

MR. TOPKIS: It is a document prepared by somebody, and addressed to somebody, but we have got some people who are our dear friends here, but they have business interests somewhat antithetical to ours.

I would like to not go into the subject matter of the document in their presence and I don't understand what we are doing, what the thrust of the questioning is.

MR. YOUNGWOOD: My only questioning really will relate to whether that is an exyract from a document which might contain other information useful to us. I will not go into the contents of the document.

MR. TOPKIS: Okay. If the witness knows whether that is an extract, I have no objection to that.

THE WITNESS: This is an extract, yes, from a document that was produced, well, in March, 1973. It says so. It is not a routine document, it was a request to have a progress report on how they were getting on, as I recall it.

By Mr. Youngwood:

Q A request to have a progress report from whom?

A From InterMed, we were, then, calling it, which is our medical equipment grouping.

Q To whom?

A It would be made, I would have thought -- I can't remember, but it would have been made either to the Chief Executive of the Division at that time, and given a circulation which would certainly have included me.

It may have been addressed to me, I can't remember that, just with a piece of paper on it, like that.

Q Does that type of document exist for other Divisions as well?

A Not necessarily. Each Division in our group operates autonomously and differently, and quite differently in style, sometimes. It depends upon the Chief Executive running it. So they don't all follow the same format of information. Neither, for example, would this represent one of a series of progress reports. This represented a spot progress report.

Q You have indicated not necessarily. Does that mean that it did not exist for gas, for your gases division, for instance?

A Oh, I am sure that they didn't do a progress report just like this.

Q You are sure they did not, sir?

A Yes, if they did it, any reporting they did would be in a different way. They would report monthly, for example. Under normal circumstances, each of our divisions reports monthly.

Q On that very subject matter?

A On this subject matter? Oh, no, Gases Division isn't responsible for things like wheelchairs and orthopedic equipment.

Q No, I recognize that, sir.

A Yes.

Q But for those products which they are responsible, would they indicate the type of information listed on that particular piece of paper?

A Not in a form of a progress report, but they would cover any acquisition activity in their ordinary monthly report as a matter of routine.

Q Ordinary monthly report, sir?

A Yes, a monthly report. Every Division produces a brief comment for its operations on the month.

Q Is it possible that you furnished us an extract of something from a monthly report?

A For gases?

Q I do not recall. I have tried to examine each document which we have received and I don't recall any monthly report from gases, yes, sir, and I am wondering whether I might possibly have missed it.

A I wouldn't have thought you would have received anything from a monthly report on gases, because they, as a Division, were concerned with the U.K., and Europe.

Q Oh.

A We don't have a central central corporate gases group. Perhaps that is what is confusing you. Our gases operations are operated pretty well autonomously, and the one in the U.K. operates for the UK and Europe and Northern and Southern Ireland.

Q Was there such a report written then with respect to possible acquisitions in the United States?

A You have received those. They were not dealt with by our Gases Division. They were dealt with by our Group Strategy people.

Q Will you describe, please, the procedures which were followed by BOC in complying with specification 5? Specification 5 reads as follows: Documents which contain, provide or set forth summaries of minutes of meetings, of communications between member os the Executive Committee or Board of Directors of BOC, which minutes or summaries refer, analyze, compare, comment on, set forth or relate to entry or potential entry, or increase in market shares, in the United States in the industrial gas market, or in any medical products market for the period 1967 to date.

JUDGE BARNES: Mr. Laister, here is No. 5.

(He handed the document to the witness.)

THE WITNESS: Oh, thank you very much, Your Honor.

Yes, the Company Secretary, Mr. Alan Leslie, CAB Leslie, was asked to go through all of the formal minutes of the Board of Directors and of the Executive Committee and to extract all minutes which were relevant.

Additionally, I know that the Chairman, Mr. Smith, did, himself, go through minutes and files for his own information and had discussions with Mr. Leslie, you know, about the material. So that it was, most of it, was double-checked to insure that we had done it properly.

By Mr. Youngwood:

Q Then, I presume that we can, I assume without any fear of contradiction, that there were no documents containing, providing or setting forth minutes or summaries of meetings, and so forth, with respect to the Perham Greenfield studies?

A I think there was one reference in a Board report, which I think you have received. But in actual fact, the Perham Greenfield Report was discussed at a meeting called "BOC International," which was an informal, a more informal meeting than a Board meeting and it has a different constitution.

It was discussed at a Chairman's committee meeting and there were no formal minutes of that.

Q So then, there was no action taken?

A Because it was not taken to the Board, because the decision was to take no action.

Q Then, the recommendations were neither adopted nor rejected?

A I don't think that would be a fair assumption.

Q Were they adopted?

A Yes.

MR. TOPKIS: If Your Honor please, at this point, I think we are so far beyond the question of compliance with a subpoena, we oxght to stop.

JUDGE BARNES: I think that is correct, Mr. Youngwood.

MR. YOUNGWOOD: I think the question, Your Honor, is whether we could assume, as we do at this moment, that BOC did not adopt a study. The reason for and the reason that I have pursued the course of ation that I have is to insure that we have every document which relates to that particular study, which apparently might form an important element of this case.

THE WITNESS: You do, sir.

MR. YOUNGWOOD: All right, thank you.

By Mr. Youngwood:

Q In an earlier filing by your Counsel, Mr. Topkis stated that if Complaint Counsel had wanted documents pertaining to possible acquisitions in the United States, they could have asked for them clearly. He felt that when we asked for documents relating to entry or potential entry or increase in market share in the United States, that we were not concerned with possible acquisition.

Did you at any time search your files for possible acquisitions?

A We have done so.

Q Oh. Then, the materials which we have relate to all possible acquisitions that BOC might have been interested in during the relevant period, which we will say, is 1967 to date?

A That is my understanding.

Q Were any files searched ---

MR. TOPKIS: Oh, excuse me, just a second.

we talking about gases and medical fields?

MR. YOUNGWOOD: Yes, sir.

MR. TOPKIS: Okay, fine.

MR. YOUNGWOOD: Yes.

By Mr. Youngwood:

Q Was there any file search in response to specification 6, other than the files of the individuals mentioned therein?

A Would you repeat that question? Are you asking were these files searched, or were other files searched?

Q WEre these files searched?

A These files were searched, yes. The individuals concerned were each asked to search their files and it was generally known that any files that anyone had that related to North America should also be searched.

Q That would have been, included Fraser Sweatman, Inc., would it not?

A Yes, sir, certainly.

Q Mr. Laister, I have only a few more questions, then, we will be through.

In December, we asked you, asked Mr. Smith, whether there was any contact which had been made with any companies in the United States in the industrial gas field. Both of you responded no.

We now have received documents which indicate that there was substantial contact made. I just would like to insure at this point once again that we now have the entire compliance.

At that point in time, I think we may have had a difficulty in language, because the answers to the questions are very clearly no, that no contact at all was made, and it is obvious now that there was contact.

If you will, I would like you to assure me that we have records which reflect all contacts made.

MR. TOPKIS: If the speech may be stricken, and we may deal only with the question, I will have no objection to Mr. Laister's answer.

JUDGE BARNES: All right. Are you referring to specification 6?

MR. YOUNGWOOD: Your Honor, in December, when we were up in New York, we asked questions which are not very dissimilar from specification 5.

JUDGE BARNES: I am not interested in what you asked in December. I am interested in you directing your questions to the subpoena which we have issued. If you have other questions for Mr. Laister, call him as a witness in the proceeding but ---

MR. YOUNGWOOD: I would just like to insure that what is being submitted to us now is somewhat more responsive to our requests than what was given to us in December.

JUDGE BARNES: Isay, let's forget about December, as far as I am concerned here today. Ask him if he has complied with specification 6; if his interpretation of specification 6 includes documents which relate to potential entry in the United States industrial gas market, something like that. Let's have a specific question, and not what he said in December.

By Mr. Youngwood:

Q All right.

Have you complied fully with specification 6?

A We have, sir.

Q My only other questions relate to, and I am diverting at this point in time, to sales by Fraser Sweatman, Inc., and also sales which are listed as rubber and sundry products, I believe, rubber and plastic sundries.

A Yes.

Q Let us direct our attention first to sales by Fraser Sweatman, Inc. You have a listing for accessories of 150 ---

MR. TOPKIS: Hold it, please. If Your Honor please, this is ---

JUDGE BARNES: Show the witness and ask him.

MR. TOPKIS: Without mentioning them.

MR. YOUNGWOOD: All right.

(Mr. Youngwood showed documents to the witness.)

MR. TOPKIS: I don't see anything in here about rubber.

MR. YOUNGWOOD: It is not here. I will get to that. It is not in Fraser's letter.

THE WITNESS: I recognize that, yes.

JUDGE BARNES: Let's state generally, so we know what you are referring to without putting any money figures in there.

By Mr. Youngwood:

Q The response refers to accessories. It refers to veterinary accessories, dental accessories and hospital accessories?

A Yes.

Q And doesn't break them down any further?

A That is right. Mr. Sweatman was asked to give as much information to comply with your tabulation as he was able to, in the time available, particularly, and this was the only detail that, in fact, he had categorized to handle; so that ---

Q So that we ---

A So this is, then, what was listed. So you have as much information as I do, for example.

Again, there are invoices and things like that which I suppose may be broken down, to the detailed analysis, into some of the categories you want. But without going through that process , for which no time was available, we would not have any more detailed information at this stage than that.

Q Can I presume that the word accessories relates to those items listed in the specifications of the subpoenaes mailed out to third parties?

MR. TOPKIS: I don't think that is a fair assumption at all. And I don't know how this witness can be asked to answer the question. All he knows, not being an officer of Fraser Sweatman, Inc., is that he sent a questionnaire to Fraser Sweatman, Inc., and this is the answer that he got back.

JUDGE BARNES: I think the witness can answer that question; if that is the answer.

Is that correct, Mr. Laister?

THE WITNESS: That is correct, Your Honor, yes.

MR. YOUNGWOOD: Your Honor, ---

THE WITNESS: For all I know, it may include items that weren't on your list, for example, in accessories. I don't suppose your list was a totally exhaustive list of all the medical items that could be sold.

By Mr. Youngwood:

Q No, sir. No, we had another category, and I believe that there would be individuals who might believe that anesthetic equipment, it could extend or include products other than those that we have lsited. And that is why I am somewhat concerned.

A Yes. WE made the list available to Fraser Sweatman and that is the information that I have received, and signed for.

Q So that the material which has been given us, then, is not at all responsive to the request, is it?

A It was very responsive, we felt, in the effort that was made.

Q Yes, sir. But you have indicated that accessories which You have listed are not necessarily accessories that we have listed?

A No, sir. I am just saying they cannot give you a detailed breakdown of that accessory list. If we had been able to do so we would already have done so.

Q So, the only way to do it, then, is to give us the invoices?

A As far as I know, that is correct.

Q Can you tell us what categories were included in the accessories?

A I can't..

JUDGE BARNES: Mr. Laister, can you furnish Mr. Youngwood a listing of the items included in accessories?

THE WITNESS: I am sure thatFraser Sweatman could.

By Mr. Youngwood:

Q All rithr, would Fraser Sweatman also be able to give us an estimate, his estimate, as to the percentage of each of the accessory figures as they may relate to our particular market?

A We can ask him. I can't tell what his answer will be but we can ask him, sir.

Q That could be helpful.

A But what you realize, a percentage may not be precise. If we had precise figures, you would have already received them. Therefore, a percentage may be an estimate.

Q I would be, at this point in time, willing to accept anything which would permit us to formulate a market share. And if that is the best that can be done without the invoices, then at least that would be a start.

A I would be very happy to go back to them and ask them to help in that way, if they can.

Q Mr. Laister, there is a category listed as rubber and plastic sundries. It is listed in the submission which you have made to us now and it was also listed in an earlier submission. It was the larger category, I believe, of products that were sold to non-BOC subsidiaries in the United States and there were also some products of this nature sold to subsidiaries in the United States.

Is it possible to explain what rubber and plastic sundries are?

A I couldn't do so at the moment, sir. I would have to find out.

JUDGE BARNES: Can you furnish that information to Mr. Youngwood?

THE WITNESS: Yes, we can ask Mr. Sweatman, or whichever company it is he is referring to, to give a list of items that would be included in that list.

MR. TOPKIS: I am sorry, I am a little lost. There does not appear, so far as I can see on this statement, any information relating to sales of rubber and plastic sundries to non-BOC subsidiaries.

MR. YOUNGWOOD: Okay, that is ---

MR. TOPKIS: Whatever rubber and plastic sundries may be.

MR. YOUNGWOOD: That is in your response to our request that BOC be required to comply with subpoena duces tecum, and I believe that you also furnished that material a few days earlier.

MR. TOPKIS: Oh, I see.

MR. YOUNGWOOD: The only reason they asked for that particular information is so that we might be able to differentiate inhalation anesthetic equipment and inhalation respiration equipment.

MR. TOPKIS: I see. So we are being asked in particular what is included in the term rubber and plastic sundires, is that it?

MR. YOUNGWOOD: Yes, sir.

MR. TOPKIS: Okay. We will do the best we can.

MR. YOUNGWOOD: We would be happy to take a look at a percentage estimate, with respect to the percentage, as they relate to endo-tracheal tubes and percentage relates to tracheatomy tubes and any other items contained in there.

THE WITNESS: If we have that information available, we would be happy to provide it. But I really don't know whether they do have it available.

MR. YOUNGWOOD: Mr. Laister, thank you for appearing and answering our questions.

THE WITNESS: Thank you very much.

JUDGE BARNES: Any questions, Mr. Topkis?

MR. TOPKIS: No, Your Honor.

JUDGE BARNES: Mr. Wade?

MR. WADE: No, sir.

JUDGE BARNES: Mr. Laister, thank you very much.

MR. LAISTER: Thank you, Your Honor.

(Witness excused.)

JUDGE BARNES: Are there any other matters we can discuss fruitfully at this time?

MR. TOPKIS: Could Your Honor just tell us what your daily schedule will be? We will start at 9:30 a.m. every day?

JUDGE BARNES: 9:30 a.m. and go to 12 p.m., 12:15 p.m., at a convenient point, 12:30 p.m. and perhaps come back at 2:00 p.m. go to 4:30 p.m. or 5:00 p.m., something like that.

MR. TOPKIS: Very good, Your Honor, Thank you.

JUDGE BARNES: I would like to adjourn at 5:00 p.m. every day if it is conveneint but we can stay later if we have a witness we have to dispose of or who can't come back.

Will that be satisfactory?

MR. TOPKIS: Oh, absolutely, Your Honor.

MR. WADE: Yes, sir.

MR. YOUNGWOOD: Your Honor.

JUDGE BARNES: Yes?

MR. YOUNGWOOD: I believe that we might be able to save ourselves some difficulties. Mr. Topkis has asserted that the difference between fiscal year sales figures and calendar year sales figures is somewhat trifling. If Mr. Topkis would be willing to stipulate that the figures which exist for the particular fiscal year would be accepted as calendar year figures for our purposes, our sales purposes, I think that might save us a considerable amount of work.

JUDGE BARNES: You have nine months of one fiscal year in calendar year. If you will just take that fiscal year and say that applies to the upcoming calendar year, whatever you all can agree to is all right with me.

MR. TOPKIS: We will do our best, Your Honor. Let us take a look at it.

JUDGE BARNES: All right. Is there any point in having another pretrial?

MR. TOPKIS: I don't think so. Just one thought occurs to me, Your Honor, I see we have on the first two days of the trial schedule, one witness per day. And I can assure the Court and my adversaries that both Mr. Wade and I are notoriously brief in our cross-examination.

JUDGE BARNES: I am glad to hear that. I am going to ---

MR. TOPKIS: You may hold us to it. I wouldn't want us to run out of witnesses.

JUDGE BARNES: We have a great number of documents we could take up on those two days and maybe dispose of all the documents.

If they don't need a witness with a document, bring it up, offer it. I can't set the schedule. We do want to keep busy.

MR. YOUNGWOOD: Your Honor, the reason that ---

JUDGE BARNES: Mr. Topkis and Mr. Wade will be down here from New York and they don't want to be putting in half days.

MR. WADE: That is right.

MR. YOUNGWOOD: I would volunteer that we listed only one witness for both of those days because we believe that their testimony might be somewhat more lengthy than the testimony of others. I would presume that recognizing the alacrity with which Mr. Topkis will cross-examine, it is possible that he may wish to devote more of his time to cross-examination of these witnesses than any others.

Also it should be noted that Mr. Flam has been called to appear at 10:30 a.m. and, therefore, we have deprived ourselves of one hour on that day.

JUDGE BARNES: All right.

We do want to keep busy and keep the case moving along. So if nothing further, I will see you on May the 6th.

MR. TOPKIS: Very good, thank you, Your Honor.

MR. WADE: Thank you, Your Honor.

XXXXX (Whereupon, at 12:55 p.m., the prehearing conference concluded.)

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BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER :

of : Docket No. 8955

BRITISH OXYGEN COMPANY, LTD., :
BOC FINANCIAL CORPORATION, :
BOC HOLDINGS, LTD., :
BRITISH OXYGEN INVESTMENTS, LTD., :
AIRCO, INC. :

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Room 7314, The Star Building,
414 Eleventh Street, N. W.,
Washington, D. C.,
Monday, May 6, 1974.

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

ERNEST G. BARNES, Presiding Administrative Law Judge.

APPEARANCES:

E. KEITH THURMAN, GORDON YOUNGWOOD, DON PURCELL, DARYL NICKEL, RHETT KRULIA and JOHN HOAGLAND, on behalf of the Federal Trade Commission.

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison, 345 Park Avenue, New York, New York, 10022, on behalf of Respondent, British Oxygen Company, Ltd.

GEORGE J. WAIE, R. BRUDE MacWHORTER and DANFORTH NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York, 10005, on behalf of Respondent AIRCO, INC.

ROBERT L. DOAN, Assistant General Counsel, Union Carbide Corporation, 270 Park Avenue, New York, New York; and ALEXANDER W. SIERCK, Wald, Harkrader and Ross, 1320 19th Street, N. W., Washington, D.C., 20036, on behalf of Union Carbide Corporation.

PROCEEDINGS

JUDGE BARNES: This is the commencement of formal hearings in the matter of British Oxygen Company, Limited, et al, Docket Number 8955.

As a preliminary matter this morning, I would like to offer to the complaint counsel verified statements from North American Draeger, which I received in the mail Friday. This is in response to the subpoena.

North American Draeger, in a letter addressed to me dated May 1st, 1974, asked for confidential treatment of these figures and also for In Camera treatment if the information is later received in evidence.

On Friday, I ented an order in response to complaint counsel's motion filed earlier for protective order. I entered a protective order covering sales information and shipment figures and the same order will apply as the protective order which I entered on April 24th in ordering complaint counsel to make certain documents available.

So, we have one protective order that applies to all sales information in this proceeding.

Did you receive the copy of my later order?

MR. TOPKIS: The one on Friday? Not yet, Your Honor.

JUDGE BARNES: Are there any other preliminary matters we can take up?

MR. THURMAN: Your Honor, on the basis of the protective order, there is one more document that we have listed on our exhibit list that we have not turned over to Mr. Topkis. We need a protective order for this particular document. Complaint counsel intends to introduce this document through Mr. Dempster as it was received from Mr. Dempster, who will be appearing on Wednesday. So, if we could get a protective order to cover this one particular document which had their plans to enter the U. S. market.

JUDGE BARNES: What is the nature of the information in the document?

MR. THURMAN: The nature of the document is Liquid Air of Canada's plan prior to entering the U. S. industrial gas use market, to their form of entry, how they planned to enter, what companies were available for acquisitions, as such.

JUDGE BARNES: When are you going to turn this over to Respondent?

MR. THURMAN: As soon as we get a protective order.

Also, Your Honor, I might add on this, maybe it is a little premature in saying as soon as we get a protective order -- some portions of this document are in French. We believe that we would have to interpret that and get a certification as to the interpretation of the French.

JUDGE BARNES: When are you going to do this?

MR. THURMAN: Hopefully today.

I don't know whether Respondent's counsel would accept our certification from our interpreter or would want an interpreter of his own to certify it, also.

JUDGE BARNES: Let me suggest, if you are going to offer the document on Wednesday, turn it over to him right now and we will worry about the French later. It will be under the same protective order that I entered on Friday.

MR. THURMAN: I turn a copy over to Mr. Topkis and a copy to Mr. Wade.

MR. TOPKIS: Your Honor, one other preliminary matter.

We have not previously submitted to you a formal protective order relating to the document which we produced to the complaint counsel. I would like to do so now just to make the record totally clear.

JUDGE BARNES: I take it this order will not be filed? You are merely presenting it to me this morning?

MR. TOPKIS: I am presenting it to you in the hope that Your Honor will sign it whenever it is appropriate.

JUDGE BARNES: Is it different from the one I entered on April 24th?

MR. TOPKIS: I think it tracks it perfectly, Your Honor.

JUDGE BARNES: Any other preliminaty matters to take up?

MR. WADE: Your Honor, while we are on the subject of protective orders, we have not yet filed our list of outside counsel pursuant to your order in connection with BOC's subpoena matter.

Those counsel are Messrs. MacWhorter, Wollen and myself, members of the firm; and Mrs. Campbell, Mr. Hawkins and Mr. Newcomb, who are assisting us. We will file this downstairs. If Your Honor will take a copy of it.

JUDGE BARNES: I will take a copy of it. You file it with the secretary's office.

I take it you owe me a list, also?

MR. TOPKIS: We will get one.

JUDGE BARNES: It was filed with the secretary's office?

MR. TOPKIS: Yes.

JUDGE BARNES: I assume I have not gotten served.

MR. THURMAN: Your Honor, further on these protective orders and lists of people available, I understand that at the last pre-trial conference in which I was, unfortunately not present, the secretaries were included in these designated people. I see no designation of any secretaries on these lists of people to have access to confidential documents.

I do not believe it should be carte blanche that any secretary in the law form or what-have-you should have access even though this is more of a problem for third parties' information than counsel problems. Since they are not present, I should speak to that.

They certainly should not be given any access, any secretary go through the documents and reveal the contents to operating personnel of respondents.

MR. WADE: That would be an intolerable strain on the office procedures that we have since most of our associates do not have their own secretaries.

I can assure Mr. Thurman the only secretaries who would be permitted access to these documents are those working at that moment directly for one of the six lawyers who are on that paper.

MR. THURMAN: Unless the people listed would have access, it certainly is a useless document.

JUDGE BARNES: I think we should have a listing of the secretaries.

MR. TOPKIS: What are we going to do then, give a list of the 20 secretaries on whom we may at one time or another call to type one paragraph of a document.

I am not worried about the Federal Trade Commission betraying my secrets. I am not asking for any list of their secretaries. I don't know why they should ask for a list of mine.

I really think in this day and age private law firm secretaries have every bit as much of a right to claim personal integrity as Government secretaries.

MR. THURMAN: I appreciate Mr. Topkis's view.

As far as I am concerned, British Oxygen and AIRCO don't deserve the protection of third parties. They are the ones who allegedly violated the law. Third parties are the ones who really deserve the protection.

MR. TOPKIS: All the nonsense I have heard in some time about presumption of interest --

MR. WADE: That is very close to a motion for mistrial.

MR. THURMAN: Also, this protective order that I haven't read completely but just submitted by Mr. Topkis, it says each document produced by BOC should be covered under this protective order. They certainly have to show cause why this deserves protection, not just make a blanket request and have everything they submit to the Federal Trade Commission to be covered by a protective order.

The Commission certainly will have this available to them at a later date on any type of review.

I submit that this is not a proper protective order to cover BOC.

JUDGE BARNES: Can you show me any protective orders that have been entered at the Federal Trade Commission that cover secretaries or clerks?

MR. THURMAN: No, sir. I never have had secretaries or clerks review protective orders. Lawyers in our operation review --

JUDGE BARNES: Has one been entered which required a listing of secretaries?

MR. THURMAN: No, sir; I have never had this brought up before, in my experience. This is normally why it is very restrictive as to a protective order, that only proper material that deserves protection falls under a protective order because it is so hard to control.

JUDGE BARNES: I am not going to enter an order today requiring a listing of the secretaries in the law firm. I am going to leave that up to the integrity of Mr. Wade and Mr. Topkis. I will accept this listing as compliance today.

MR. THURMAN: One other matter, Your Honor.

We have an answer to complaint counsel's request for admission of fact. It is a supplementary request that was filed. BOC respondent has responded with an objection that it is too close to trial and therefore plan on not answering the request for admission of fact.

Rather than respond in writing, I believe it might be proper at this time to take up this objection and respond to it, with Your Honor's permission.

JUDGE BARNES: Is this your complaint counsel's supplemental request for admission of facts?

MR. THURMAN: Yes, Your Honor.

JUDGE BARNES: Filed April 30, 1974?

MR. THURMAN: Yes.

JUDGE BARNES: There has been a blanket objection to all of these requests?

MR. THURMAN. Yes, Your Honor.

MR. TOPKIS: Has Your Honor received a copy of our objection?

JUDGE BARNES: No.

Is there any further statement either side wishes to make at this time before I make a ruling on this?

MR. WADE: Just as a formal matter, we have not filed a piece of paper yet with the Commission stating our objection but we do object to complaint counsel's request.

MR. THURMAN: Complaint counsel submits that the objections are without merit. There is nothing in the rules that say you can't submit request for admission of fact just prior to trial.

Secondly, these documents are in the possession -- they were received from Respondents. Certainly, that is not a valid objection.

Therefore, we intend to proceed with some other requests for admission of fact.

We cannot get a stipulation on the sales data which Your Honor has ordered that we try to work out a stipulation.

Respondents pushed this trial to try to get -- they have been wanting to go to trial since April 1st. Just because the Commission got an injunction, there is no reason why the Commission should not have proper time to prepare their case. We are going along and we want to expedite this trial.

One of the things to expedite this trial is to request admission of fact. Therefore, this is entirely an invalid objection.

JUDGE BARNES: All right.

As I read Rule 331, it says, "At any time after 30 days after issuance of complaint any party may serve on any other party written request for admission."

Rule 331 also says, "Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be and in the request are stated as being in the possession of the other party."

On these documents, Mr. Thurman, did you state that they are in the possession of the other party?

MR. THURMAN: Technically, it was not stated in the motion. But all of them are received from Respondent. Some of these documents were only received a couple of days before request for admission of fact was filed. Respondents have been very delinquent on answering the subpoena on giving documents over. They are two weeks past the return date. We need the documents before we can go out and request for admission of fact. Certainly they know these documents were in their possession. It is a simple request.

MR. WADE: Your Honor, I must say that from the very beginning my client has given every piece of paper that the FTC complaint counsel has asked for on time and early. As far as this particular request for admission of facts goes, I find that Mr.Thurman's characterization of it is not exactly in accordance with the piece of paper.

For instance, Request Number 15 talks about BOC expressing some interest about something or other. There is no document stated there. I have never seen any such expression of interest. I have no idea where to look for that. And, to start tracking that one down on May 6, 1974, when this trial has already started, strikes me as inappropriate and improper.

JUDGE BARNES: Who is Mr. Bollinger? Is he an employee of AIRCO?

MR. WADE: No.

It apparently is a BOC problem; I don't know.

MR. THURMAN: Excuse me, Your Honor.

I did not direct this to AIRCO. AIRCO did return the subpoena on time.

I was directing my remarks to BOC.

MR. TOPKIS: On Item 15, that is the blindest kind of statement:

"On or about September 3, 1973, OBOC expressed an interest to Mr. Bollinger" --

Who is Mr. Bollinger? I have no idea.

-- " in obtaining information concerning any company" et cetera -- "which Neiderhoffer, Cross and Zeckhauser, Inc." -- who are they -- "represented."

How can I do this?

Obviously that came from a document somewhere. They gave me the document. I probably would admit it is an authentic document.

So far as the rest of these requests are concerned, they are the same kind of imprecise characterizations of testimony in evidence rather than evidence. They very first one says that the '73 combined sales of BOC and AIRCO account for more than the sales of industrial gas than any other producer of industrial gas. Where? Sales in dollars or pounds, francs, what?

JUDGE BARNES: Is this in the world or in the U.S.?

MR. TOPKIS: Exactly.

MR. THURMAN: The footnote, I believe, says world-wide basis.

MR. TOPKIS: It is world-wide. There is no relevance to it.

JUDGE BARNES: I am going to require you to file an answer or a specific objection to each of these requests for admissions by Monday, nine-thirty, and that date is May 13th.

MR. TOPKIS: Very well, Your Honor.

JUDGE BARNES: Both Respondents will have a response to these requests on May 13th by nine-thirty a.m.

MR. TOPKIS: We will comply with Your Honor's order.

But our position had been in reliance of the last paragraph of subparagraph (c) of Rule 331 which says that the Administrative Law Judge may determine the final disposition that the request be made at a pre-hearing conference or at a designated time prior to trial. To us, that is contemplated that the procedure of requests to admit should terminate before trial.

We have no objection. We will file the response.

MR. WADE: We will file the response but we will stick with our objection.

JUDGE BARNES: We are under an expedited schedule and we are going to have to bend a little. The objective here is to get the facts.

Complaint counsel did file these requests prior to trial. So, I am going to require the answer by the 13th, as I have stated.

Is there anything else we should take up?

MR. THURMAN: We have no other preliminary matters, Your Honor.

JUDGE BARNES: Mr. Wade or Mr. Topkis?

MR. TOPKIS: No. We are ready to go, Your Honor.

MR. WADE: So are we.

JUDGE BARNES: Are we going to have any brief opening statement by either side?

MR. THURMAN: Complaint counsel does not desire to make an opening statement.

MR. TOPKIS: We are ready to go, Your Honor.

JUDGE BARNES: We will proceed, then.

What is your preference now, Mr. Thurman?

MR. THURMAN: Your Honor, we have a witness scheduled to testify at ten-thirty. So, we would like to use the 10 to 10:30 time to start introducing documents.

JUDGE BARNES: Do you have a list of your exhibits that you can offer for identification purposes?

I mentioned this at our last pre-hearing conference, that you should hae it ready.

MR. THURMAN: If I understand Your Honor, this is for the benefit of the reporter. Our experience is that the reporter enters them as an exhibit after all the exhibits have been introduced and on the xhibit list say what is objected or admitted or withdrawn.

JUDGE BARNES: That is not what I had in mind. I had in mind a listing of the exhibits for identification purposes so you would not have to stand here and read into the record an identification each time you offer a document. The identification will be in the record.

MR. THURMAN: It is already in the record; they were filed.

JUDGE BARNES: I would prefer to ake it an exhibit that will go into the docket binder. If you has an extra copy, mark it.

MR. THURMAN: Your Honor, may I give this for identification -- it is not properly marked yet. It will be Commission Exhibit 303 and then we will have to paginate it with the letters.

JUDGE BARNES: Commission Exhibit 303 is an identificationof complaint counsel's Exhibits 1 through 302, I take it?

MR. TOPKIS: We have not been advised of 300, 301 and 302, Your Honor.

MR. THURMAN: These exhibit lists were filed and are in the record. Of course, Mr. Topkis has not been advised because we just now assigned a CX number to it.

JUDGE BARNES: He said 300, 301 and 302 he had not advised of.

MR. WADE: Our last CX number is 299.

MR. THURMAN: They do not have to be in order. We can assign any number we please.

JUDGE BARNES: All right.

He has not assigned an Exhibit 300, 301 or 302.

For identification purposes, this will be 303.

(The papers referred to were marked Commission's Exhibit 303 for identification.)

JUDGE BARNES: Is there any objection to Commission Exhibit 303?

MR. TOPKIS: No, Your Honor.

I still would like to know who the mysterious strangers are but I suppose I will find out at some point.

MR. WADE: We have no objection.

JUDGE BARNES: At this time, complaint counsel has offered Commission Exhibit for identification 303 but they have not assigned the appropriate subnumbers yet, but this will be done immediately.

At this time, I am going to receive Commission Exhibit 303 merely for the purpose of identifying Commission Exhibits for identification CX-1 through CX-299.

(The papers referred to, heretofore marked for identification Commission Exhibit 303, were received in evidence.)

MR. THURMAN: Your Honor, pertaining to Commission Exhibit 303, we do not intend to offer some of the document listed there. For the record, would Your Honor desire us to read the numbers we are going to withdraw?

JUDGE BARNES: That will be very helpful.

MR. THURMAN: Complaint counsel withdraws CX-13, CX-20, CX-24, CX-28, CX-33-B, CX-39, CX-54, CX-65, CX-120, CX-134, CX-160, CX-167, CX-189, CX-190, CX-191, CX-194, CX-195, CX-196, CX-199, CX-200, CX-201, CX-202, CX-205, CX-206, CX-212, CX-220, CX-235, CX-237, CX-238, CX-239, CX-240, CX-241, CX-252, CX-256, CX-277.

MR. WADE: May I ask the reporter to read those numbers back?

(The testimony referred to was read by the reporter.)

MR. WADE: Thank you.

JUDGE BARNES: In glancing through this exhibit now, I notice Commission Exhibit 9 has a correction on the lettering.

Do you have a copy that you can refer to, Mr. Youngwood?

What is the correct number of 9, now, CX-9-A through Z?

MR. THURMAN: Through Z-7.

JUDGE BARNES: It says 8.

MR. THURMAN: Your Honor, the correct version of CX-9 is CX-9-A through Z-8. Two pages had identical numbers, so the correction was made for that purpose.

JUDGE BARNES: How about 11?

MR. THURMAN: Does Your Honor have Z-10?

JUDGE BARNES: I have Z-12.

MR. THURMAN: The corrected copy is the one given your number.

JUDGE BARNES: Commission Exhibit 11 is CX-11-A through Z-12.

Commission Exhibit 46 has no subnumbers. It is just Commission Exhibit CX-46.

Commission Exhibit 56 has subnumbers A through L. CX-256-A through L.

Commission Exhibit 85 is CX-85-A through Z-2.

Commission Exhibit 102 is 102-A-H.

Commission Exhibit 110 is 110-A-G.

I am going to have to ask complaint counsel to make corrections to Commission Exhibit 166. I cannot make out the writing on here. Complaint counsel is going to have to renumber Commission Exhibit 166 and we will correct the list accordingly.

Commission Exhibit 174 is 175-A through Z-10.

Complaint counsel is going to have to renumber Commission Exhibit 176.

Commission Exhibit 177 is 177-A through Z-39.

Complaint counsel is going to have to renumber Commission Exhibit 180. They are going to renumber Commission Exhibit 182.

Commission Exhibit 202 is 202-A-B.

Commission Exhibit 203 is 203-A-S.

Commission Exhibit 204 is 204-A-Z-20.

Those are the only corrections I see at this time.

Now I ask you to renumber the exhibit numbers I gave you and let us know after the lunch break.

MR. THURMAN: Yes, Your Honor.

JUDGE BARNES: All right.

Proceed.

MR. THURMAN: I am not sure that we will have time to introduce the document at this time.

I would like to bring up one point prior to the introduction of the documents.

We intend to introduce BOC's document or documents received from BOC's files and then the documents received from AIRCO's files.

We have asked Mr. Topkis to give us a list of the documents to which they have no objection. We didnot receive any such list or any indication as to which documents there is no objection to. Normally, complaint counsel introduces the the documents as a group where there is no objection.

Would Your Honor like to proceed in that manner or proceed with each document individually?

I don't know any other way as long as we have no indication of what documents have objections and which ones don't except going through them one at a time.

JUDGE BARNES: I propose that we take about a 10-

minute recess and then you call your witness. If we finish with the witness this afternoon, we will take an adjournment and you can get together with Respondent's counsel. If they have no objection to the group, you can offer the group. If they want to proceed on a one-by-one basis, we will proceed on a one-by-one basis.

We will take a 10-minute recess.

(A brief recess was taken.)

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xx ALEC FLAMM was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

JUDGE BARNES: Give the reporter your name and address.

THE WITNESS: Alec -- A-l-e-c -- Flamm.

Home address is 395 Claflin Avenue, Mamaroneck, New York.

xx MR. THURMAN: Your Honor, complaint counsel has as its first witness Mr. Alec Flamm. Mr. Flamm is represented by counsel who may want to make an appearance for the record.

Mr. Doan, counsel for Union Carbide, and Alexander W. Sierck, law firm of Wald, Harkrader and Ross, 1320 Nineteenth Street, N. W., Washington, D. C., 20036.

DIRECT EXAMINATION

By Mr. Thurman:

Q Would you please state your full name and home address?

A Alec Flamm.

Home address is 395 Claflin Avenue, Mamaroneck, New York.

Q Are you employed?

A I am.

Q By whom?

A Union Carbide Corporation.

Q What is your present position with Union Carbide Corporation?

A I am the Senior Vice President of the Linde Division of Union Carbide.

Q How long have you held that position?

A About a year.

Q What are your duties and responsibilities as Senior Vice President of the Linde Division?

A I have four separate organizational entities reporting to me. One is the Gas Products Department which is the industrial gas business of Union Carbide in the U. S. One is the Welding Products Department which, as the name denotes, is the welding business of Union Carbide in the United States.

The third is a coatings service business which is a service business providing proprietary coatings for various industires such as the aircraft industry; and the fourth is a distributor marketing organization which has the management relationships with the various distributors that market our industrial gas and welding products.

Q What was your position prior to becoming Senior Vice President of the Linde Division?

A I was the Vice President and General Manager of the Gas Products Department.

Q How long didyou hold that position?

A Since 1969.

Q What were your duties and responsibilities as Vice President and General Manager of the Gas Products Department?

A It had both operational duties; in other words, it had the sales production, organization of the industrial gas business reporting to it as well as the planning responsibility for the industrial gas business such as new investments for the expansion of that business.

Q How long have you been employed by Union Carbide Corporation?

MR. TOPKIS: I am sorry, Your Honor. With that air-conditioning machine, I am having a little difficulty in hearing.

JUDGE BARNES: Mr. Flamm, will you speak up, please?

THE WITNESS: Surely.

It will shortly be 25 years.

By Mr. Thurman:

Q What was your position prior to becoming Vice President and General Manager of the Gas Products Department?

A For about 30 days prior to that, I was at a level below the General Manager level in the Gas Products Department responsible for -- Assistant General Manager was the title -- responsible for the atmospheric gas portion of the Gas Products Department.

Q What position did you hold prior to being Assistant General Manager?

A I was in what we call our Cryogenics Products Department, in which I was Assistant General Manager of that department. The various product lines that came under my position included cryogenic tankage, the sale of air separation plants, some technologically oriented new ventures, and the like.

Q What was your position prior to that position?

A Prior to that, I was in that same organization one level down, in which I had responsibility for the sale of process equipment, process equipment by us being defined as air separation plants, cryogenic plants of various sorts, hydrogen upgraders, and the like. This was the sale to people outside of Union Carbide on a world-wide basis.

Q Would you detail the remainder of your experience in your employment with Union Carbide?

A Yes.

Prior to the position I just described, all of my experience was in the technical organization of the Linde Division located at Tonawanda, New York. I started there in 1949 on a classified Navy project, came to the Tonawanda Laboratory in the year 1950, remained in various engineering functions in development and design until about the year 1957; then got into various management business-oriented and personnel-oriented management of the Tonawanda Laboratory and eventually managed a portion of the Tonawanda engineering facility, from which I want into the business-oriented job I described previously.

Q Mr. Flamm, are you familiar with the term "industrial gases"?

A Yes; I am.

MR. TOPKIS: What, sir?

MR. THURMAN: Industrial gases.

By Mr. Thurman:

Q What does that term mean to you?

A Well, industrial gases means to me the production and distribution of gases such as oxygen, nitrogen, argon, helium, hydrogen, various fuel gases, CO_2 in its various forms. I am sure I have missed some.

Q What products does the Gas Products Department of Linde produce?

A Oxygen, nitrogen, argon, some more exotic rare gases such as Xenon and Krypton, hydrogen, acetylene, CO_2. That is about it.

I have left out of my definition a myriad of products that we and others in the industry call specialty gases. I have left them out mostly because I can't pronounce most of them. Most of them are in very very small quantities. We produce some, package some, resell some. That is left out of the definition at this point. One might include that in the definition of industrial gases.

Q What percentage of total shipments of industrial gases would be represented by these specialty gases you referred to?

MR. TOPKIS: Whose total shipment?

By Mr. Thurman:

Q Of Linde's.

A About four or five per cent.

MR. TOPKIS: Could I know whether that is in dollars or cubic feet?

THE WITNESS: It is in dollars.

By Mr. Thurman:

Q What products does the Gas Products Department of Linde market, that they do not produce?

A Helium --

Will you permit me to leave specialty gases out because there is a list -- God knows how long.

I think helium is the certainly major one, the only one

I can think of at the moment.

JUDGE BARNES: I take it that you do not manufacture these special gases?

THE WITNESS: We may.

When you speak of Union Carbide, it may be a by-product of one of our other divisions that we then package into cylinders or trailer and may ship them.

On the other hand, we may buy the raw material from a totally third party.

In 1972, whereas we had the latent capability of producing Xenon and Krypton, my recollection is that we did not produce those products in 1972. They are significantly less significant than specialty gas.

By Mr. Thurman:

Q Does the Gas Products Department produce nitrous oxide?

A No; not to my knowledge.

Q Does it market nitrous oxide?

A It is part of this business we have been referring to, specialty gases. It is in the specialty gas catalog but it is not a major factor within our organization.

Q Why does the Gas Products Department of Linde market products that it does not produce?

A Helium, for example?

Such products that we market that we don't produce are done upon the synergistic marketing effect in the various

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marketplaces we serve. That might be an electronics marketplace where it is important to have a rather complete product line to be able to compete effectively in that particular marketplace.

Indeed, the technological skills that are required to transport and market such products as helium are very similar, if not identical, to the skills required for the other industrial gases.

Q In what forms are industrial gases produced?

A Physical forms?

Q Yes.

A Liquid, gaseous and solid.

Q What types of customers are industrial gases marketed to?

A The industries to which industrial gases are marketed?

I will list some. I am certain I will offend someone by leaving them out.

Steel, chemical, food, electronics, various non-ferrous, alloys.

At the distributor level, various types of fabricating industries. Indeed, at the direct level, various types of fabricating industries, such as shipbuilding, pipe mills.

I think these probably represent the key but not the total marketplaces served by the industrial gas business.

Q What type of customers does Line sell these industrial gases to?

A Every one plus more than I have mentioned.

Q Why do you sell these types of customers?

MR. TOPKIS: I don't understand the question.

MR. THURMAN: I want to know why he sells such a broad spectrum of customers.

MR. TOPKIS: I suppose it is because they have money in their hands and are willing to pay for it.

JUDGE BARNES: What is your answer?

THE WITNESS: It seems an appropriate place to market these products wherever we can make a fair profit and wherever we have the various marketing and manufacturing expertise.

By Mr. Thurman:

Q To give broad coverage; is that one of the reasons?

A Yes.

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Q How do you characterize the breadth of Linde's industrial gasses product line?

MR. TOPKIS: Objection, Your Honor. That is just the vaguest question in the world. The witness may have an answer to it, but there is no feeling of rapport between question and answer.

MR. WADE: I will object to that question also.

JUDGE BARNES: Can you rephrase your question, Mr. Thurman?

By Mr. Thurman:

Q Does Linde produce and distribute a full line of industrial gasses?

A No, not totally. We have a reasonably broad line, but not what I would call a complete line. We are insignificant in the CO_2 as an example, which is a rather significant product in the industrial gas area. We are insignificant in certain portions of the fuel gas marketplace, propylene, propane, that type of thing, where we involve ourselves in the acetylene marketplace. To the extent that we are merely not involved along the periphery of some of these, we are not a full line but relatively broad.

Q Is the distributors market a full line?

A That varies with the distributor. Some of our distributors could very well market products that do not emanate with Linde. In other words, a distributor that markets Linde products could very well market such things as MAPP or welding equipment from a different manufacturer than ours. Hence they could conceivably in certain areas be broader than are we.

Q Do distributors market all of the industrial gasses distributed by Linde?

A No, not necessarily. It will vary with the distributor. In other words, a distributor is not a monolithic thing. Some distributors will have a much broader line than others. Some may be only insignificantly involved in gasses. It varies.

JUDGE BARNES: These are independent third party distributors?

THE WITNESS: That is correct. Essentially all of them are. We have some small number that we market. You see, we market some of the products directly to the end marketplace, but the vast majority of the district as I interpret Mr. Thurman's question are independent third party.

MR. THURMAN: Your Honor, my next question is sensitive to the company. They desire in camera treatment. The question is going to be in 1972 what was the value of Linde's total shipments in the United States of industrial gasses?

I would think the proper way to do it, if Your Honor grants in camera treatment to this, is to have the witness write this figure on a piece of paper and put in an envelop and seal it.

THE WITNESS: The answer to that question was actually in my affidavit.

By Mr. Thurman:

Q In 1972 what was the value of Linde's total shipment of industrial gasses in the United States?

A Approximately $195 million.

Q Does Linde report shipments of industrial gasses to the Bureau of Census of the U. S. Department of Commerce?

A Yes, we do.

Q In 1972 what was the total shipments of industrial gasses reported to the Bureau of Census?

MR. TOPKIS: Objection, Your Honor, on the best evidence basis. If there was a report submitted to the Census, I would be delighted to see it. This witness's recollection of what may have appeared on a piece of paper that was filed a couple of years ago is not the best evidence of what that paper contained.

MR. THURMAN: The only reports filed with the Bureau of Census were plant-by-plant data on forms that are free from subpoena under statute.

JUDGE BARNES: Mr. Flamm, are you able to state in your recollection the dollar figures?

THE WITNESS: Yes, I am, but with the stating of that figure I would like to qualify or give an editorial comment of my concern over the lack of any significant validity of the figure. So, if I state the figure, I would like to qualify it.

I can state the figure though.

JUDGE BARNES: All right, sir.

THE WITNESS: The figure as reported was approximately $153 million. However, due to the very vague single line definition in the instructions from the Bureau of Census which merely says report for the various volumes -- by the way, we believe volumes are good data -- merely says report the FOB value at the various producing locations. That word or that phrase "FOB value" is undoubtedly defined differently, I would guess, by everyone in the industry.

I know when we reviewed this recently we changed our minds as to how it should be defined. So, we do not assign any credibility to that figure at all and do not use it in-house. It is merely reporting a request from the Department of Commerce. In fact, if we were to look at that figure today, our best judgment in 1972 would have been about $120 to $125 million on the same volumes that the $195 million were reported.

By Mr. Thurman:

Q Mr. Flamm, do you know what constituted the difference in your total shipments and your report to Census?

A The major elements of difference have to do -- the $195 million which, by the way, does not include things like specialty gas and cylinder rental -- the $195 million is at our customer level. It could be a direct customer, it could be a distributor, it could be a cylinder customer. Whereas the Bureau of Census data is back at the plant and you have the myriad of investments and costs and things that occurred downstream of the producing plant and between that location and the customer. In other words, it is primarily the cost and prices associated with it downstream which the producing plant incurred.

Q In other words, shipments reported to Bureau of Census are FOB plant plus intra-company shipments?

MR. TOPKIS: I did not hear that question.

MR. THURMAN: Plus intra-company shipment.

MR. TOPKIS: May I have the whole question read back?

JUDGE BARNES: Please read the question back.

(The reporter read the question.)

MR. TOPKIS: Your Honor, doesn't that demonstrate that we are just lost unless we are talking about those precise documents? If a document reported a figure plus intro-company shipments -- don't misunderstand me, I have no interest in seeing these documents or piercing their confidential nature, but for Your Honor to have anything comprehensible, you have to look at the document.

MR. THURMAN: Your Honor, we intend to produce blank forms sent by the Census. It is on our exhibit list. Mr. Topkis is familiar with that. He will be able to interpret from that what it asks for. This witness is familiar with what went to Census and what it includes. We certainly cannot subpoena these documents. If they do not desire to give them to us, there is no way we can introduce these documents. This is just as good evidence with this witness' knowledge. It is a very simple question.

JUDGE BARNES: We are interested in what Mr. Flamm reported to Census and his interpretation of what he reported to Census. So, confine your questions to those lines, not what other companies did. We want to know what Union Carbide did if he can recall.

MR. THURMAN: That is what we were talking about, Union Carbide, and what the difference was. I was rephrasing and asking for confirmation on Linde's FOB plus intra-company shipments; is that correct?

THE WITNESS: That is correct.

By Mr. Thurman:

Q Now, Mr. Flamm, does Linde use these Census reports in any manner?

A We use the Census reports as they pertain to the volume, production figures. We do not assign any credence to the dollar figures and, hence, do not use them.

Q In what way do you use these?

A It is one source of information that our planning people use in trying to determine market shares.

Q In 1972 what companies in the United States produced industrial gasses?

MR. HOPKINS: Isn't there some better way of getting

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that information than by making this poor witness exhaust his recollection in a necessary failure to respond totally?

MR. THURMAN: There is a better way, a stipulation by Mr. Topkis as to which firms are in the market.

MR. TOPKIS: If complaint counsel can give me a list, I am sure we can add a few more to it.

MR. THURMAN: We don't want any additions or eliminations from Mr. Topkis. That is why I asked the witness this question.

JUDGE BARNES: We have here a witness who apparently is very experienced in the industrial gas industry and they have substantial sales. I am going to let him testify for the record as to his knowledge of who produces the industrial gasses in the United States.

THE WITNESS: In addition to Union Carbide, Air Reduction Company, Air Products and Chemicals, Chemetron, Liquid Carbonic Division of Houston Natural Gas, Big Three Industries, Liquid Air North America, Burdett of Cleveland, Burdett of Norristown, Selox, Alabama Oxygen, Northern Gasses.

MR. TOPKIS: The witness seems to be looking for help. I can't say I blame him.

THE WITNESS: My memory is exhausted. Now I have clearly not defined a distributor that might be producing acetylene out of his acetylene generator as a producer. I primarily have been zeroing in on people who produce the atmospheric gasses.

In addition to that, Mr. Thurman, there are people that produce such gasses as helium, Northern Natural Gas, Cities Service, et cetera, who are suppliers to us. As you recall, we do not produce helium. Do you want those companies as well?

By Mr. Thurman:

Q Do the helium producers distribute to your customers?

A Some might.

Q Who are the helium producers?

A I got myself into that, didn't I. Cities Service ---

JUDGE BARNES: Is that the oil company?

THE WITNESS: Yes, sir, their so-called Helix Division, Northern Natural Gas, Kerr-McGee. There are two or three significant large ones which I am not familiar with. Most of these companies were part of the U. S. Bureau of Mines conversion program and they are those producers.

By Mr. Thurman:

Q Is Natural Welders Supply Co. a producer?

A I believe they are. I believe they are also a part of the joint venture with Burdett of Norristown. To that extent I am certain they are involved in the production of industrial gasses.

Q Pacific Oxygen Company?

A Pacific is, yes; Piedmont.

Q Southern Cryogenics?

A Yes, Southern Cryogenics is a producer.

Q Is Whitmore Oxygen Company a producer?

A I am not certain. I know where they are located. I know they were a producer two or three years ago. I believe they are, but I am not certain.

Q Are you familiar with Gardner Cryogenics?

A Yes.

Q Are they a producer?

A I am familiar with them primarily from their involvement in the helium business. They may be a refiner of helium, but I think their source of helium is some of these major oil and natural gas companies.

Q Do the companies you have mentioned represent 100 percent of the gasses produced in the United States?

A No.

Q Do you know approximately what percentage they would represent?

MR. TOPKIS: I object, Your Honor.

JUDGE BARNES: I think this is going to call for some speculation, Mr. Thurman.

MR. THURMAN: I would like to bring Your Honor's attention to Papercraft Corporation where witnesses within the industry, it was felt, were knowledgeable in the industry and the whole universe was based on witnesses' estimates of the industry and without any universe figures being put in the record whatsoever. I don't believe this is that speculative. The gentleman has had 25 years' experience and is very knowledgeable in the market and should be familiar with his competitors and what makes up the market.

JUDGE BARNES: I will permit him to state whether or not he has mentioned the largest denominator in a question of that nature, but not a percentage figure. I think that would be speculative. Do you want to rephrase your question?

By Mr. Thurman:

Q Do you know if the companies you named account for virtually all of the market?

MR. TOPKIS: Account for virtually all of what?

JUDGE BARNES: Of the market.

MR. TOPKIS: I object to the characterization.

JUDGE BARNES: I believe that is an improper question.

By Mr. Thurman:

Q Could you name the four largest producers, Mr. Flamm, of industrial gasses in the United States in 1973?

MR. TOPKIS: I object, Your Honor.

MR. WADE: I object to that question also.

JUDGE BARNES: Well, if you can, Mr. Flamm, who were your four largest competitors in industrial gasses in the United States?

MR. TOPKIS: May we note our objection to that question, Your Honor, with all dues respect?

MR. WADE: Yes, Your Honor.

JUDGE BARNES: All right.

THE WITNESS: Our four largest competitors are -- if you go back to the previous notes, they are in the order in which I presented the companies -- they would be, as I recall, the Air Reduction Company, Air Products and Chemicals, Chemetron, and Liquid Carbonic Division of Houston Natural Gas. They are at the moment touch and go with Big Three as far as physical size.

By Mr. Thurman:

Q When you say Air Reduction, for the record what is their present name?

A AIRCO, Inc., I think.

Q What other competitors other than the ones you named would be the next two largest in size?

MR. TOPKIS: Your Honor, could I make one of my objections to this question clear?

THE WITNESS: Yes.

MR. TOPKIS: It assumes that all of these companies compete with each other across the board in selling something called industrial gasses. We know very well from Mr. Flamm's testimony that his company, for example, does not compete significantly in carbon dioxide and some of the specialty gasses, the fuel gasses he mentioned, propane and another one or two. There are doubtless other companies. So, to say which are the six biggest companies in a field in which the leader is not engaged across the board seems to me to be building confusion into the record rather than helping it.

JUDGE BARNES: We are not going to make a complete record on Mr. Flamm's testimony here today. I understand complaint counsel have listed some 26 witnesses. So, we are going to hear a lot of testimony and we are not going to make a decision based on Mr. Flamm's testimony alone. So, I will permit him to name the next two largest competitors, but I think this is going to exhaust the questions about company size.

Can you name them, Mr. Flamm?

THE WITNESS: Yes. If we went as far as Liquid Carbonics as the first four competitors, I would add Big Three and Liquid Air.

JUDGE BARNES: Do you consider your company the largest company in the industrial gasses business in the United States?

THE WITNESS: Yes.

By Mr. Thurman:

Q Mr. Flamm, is the industrial gasses market represented by any trade association?

MR. TOPKIS: Objection, Your Honor. I know of no industrial gasses market. I will be saying that often in this case.

JUDGE BARNES: Let us rephrase your question and say are the manufacturers of industrial gas represented by a trade association?

THE WITNESS: There is an organization entitled Compressed Gas Association. I don't know the technical definition of the word "trade association." This is primarily a technical organization that attempts to communicate with such governmental regulatory bodies as the Department of Transportation as pertains to the safety in handling and production, primarily transportation, of industrial gasses. There is another organization entitled the IOMA, International Oxygen Manufacturers Association. By the way, the Compressed Gas Association is a U. S. and Canadian organization whereas the other is more international in scope. Those are the two.

By Mr. Thurman:

Q Is Linde a member of the associations?

A Linde is a member of the associations.

Q What is the purpose of IOMA or Industrial Oxygen Manufacturers Association?

A The purpose of IOMA? I am sure the purpose is in writing someplace. I haven't seen it. Having been to several meetings -- Union Carbide is a member primarily as a supplier to the industrial gas industry, to IOMA. They have, I think, annual meetings in which technical papers are presented to the various participants. I think they have from time to time taken some positions vis-a-vis the Government. As to what exactly is the function of that organization, I can only give to you by example of activities they are participating in.

Q What are qualifications for membership in the Compressed Gas Association?

MR. TOPKIS: Excuse me, Your Honor. Mr. Lenhart of the Compressed Gas Association has been named as a witness by my friend across the aisle. I think he would be the best witness on qualifications.

JUDGE BARNES: Mr. Thurman, are you going to call a witness from the Compressed Gas Association?

MR. THURMAN: Yes, Your Honor.

JUDGE BARNES: Well, let us forego this line of questioning.

By Mr. Thurman:

Q In 1973 how many domestic industrial gasses plants did Linde have?

A I hear the question. That is not the reason I am not answering. How many producing plants did Linde have? I would say more than 70 and less than a hundred.

Q In what areas of the United States were these plants located?

A Throughout the United States.

Q In 1973 what was Linde's marketing area for industrial gas in the United States?

A Throughout the United States.

Q In 1973 in what countries outside the United States did Union Carbide or its subsidiaries produce or market industrial gasses?

A Canada, Mexico, let me just say the EEC if you include marketing, we do not have producing plants in all of EEC but we market products in virtually all of the EEC, Spain, Brazil.

MR. TOPKIS: Are we talking about producing or marketing or both as pertains to Brazil?

THE WITNESS: The question was produce or market. In Spain we both produce and market. In some countries in the EEC we only market.

MR. TOPKIS: The witness mentioned Brazil, I think.

THE WITNESS: Yes.

JUDGE BARNES: Between the 70 and 100 plants, is that within the United States?

THE WITNESS: Yes. As the number indicates, it is more a guess than it is a -- I am not certain of that number.

By Mr. Thurman:

Q What is required in your business judgment to enter the U. S. industrial gasses market successfully as a producer?

MR. TOPKIS: Objection, Your Honor. I don't know of a predicate for the inclusion of the word "market" in the question. If that is not correct, I can think of a few other objections.

JUDGE BARNES: To produce and market industrial gasses in the United States.

MR. TOPKIS: Even then I would say the question could properly be asked only if we knew how these various industrial gasses are produced. For example, and without meaning myself to testify, I rather imagine that you produce liquid oxygen in a fashion somewhat different from that in which you produce carbon dioxide. You might very well put up a plant to do the one without the other. That is true across a whole range of products that complaint counsel have denominated industrial gasses.

MR. THURMAN: I appreciate Mr. Topkis testifying, but if the witness understands the question, I would like him to answer the question.

MR. TOPKIS: I am doing my best to register an objection to the question.

JUDGE BARNES: I believe Mr. Flamm is an expert in the production and marketing of industrial gasses. While Mr. Thurman's question is rather broad, can you answer that question, Mr. Flamm, or does it need to be answered in parts?

THE WITNESS: Since the question is broad, let me try to give a broad answer. I think Mr. Topkis is right, the technology required and, I suspect, the marketing expertise required for some of the products are different than for some of the other products. I think as such the answer has to necessarily be broad and referred back to exactly that, one requires the technical expertise and the marketing expertise, marketing in the broadest sense including business knowledge right up to selling product, and it is a reasonably capital-intensive business. If one has the first two, they probably need a source of capital. I think those are probably the three main ingredients. That is a general answer.

By Mr. Thurman:

Q What would the capital be needed for?

MR. TOPKIS: The capital would be needed what?

JUDGE BARNES: "For," he said.

MR. TOPKIS: I am sorry. The air conditioning is really interfering with my hearing.

THE WITNESS: Starting with a production plant for any of these products, let us assume that it is atmospheric gasses, one would require capital for the production plant. Let me concentrate on what I would call the merchant market. One would then require capital for everything downstream of the merchant plant to be able to serve the customer.

The principal items among those would be the transportation equipment, the storage equipment, storage equipment could be large liquid cryogenic storage equipment or they could be small cylinders if the manufacturer was in the marketplace in that mode. In essence, just about everything required to serve a customer in this industry requires some significant capital investment.

By Mr. Thurman:

Q Mr. Flamm, what is the lead time on establishing a new plant in the United States to produce industrial gasses from the decision to enter to getting a product on the market?

MR. TOPKIS: If Your Honor please, again can't we distinguish between a 2,000-ton-a-day air separation unit and what I think is called a nitrogen generator, which is a little thing that sits out in the farmer's field?

JUDGE BARNES: I think perhaps the witness will make that distinction when he gives his answer. Can you answer it, Mr. Flamm?

THE WITNESS: I can give a pointed answer. Just staying with the merchant market of the business, that might be a several hundred ton-a-day air separation plant that produces liquid products for a merchant market. Too damn long is the answer, but it is two years. 23 to 26 months might be typical.

Mr. Topkis is right, a small nitrogen generating plant might take 16 to 18 months.

JUDGE BARNES: Your 70 to 100 plants, Mr. Flamm, do they all produce a broad line of gasses or does each plant produce a single gas?

THE WITNESS: The vast majority of them produce several gasses. However, there are some, again referring to these nitrogen generators, some significant number of those, perhaps 20 to 35, might be these little nitrogen generators.

By Mr. Thurman:

Q Mr. Flamm, could you describe the degree of sophistication as far as technology involved in the production of industrial gasses?

MR. TOPKIS: May I object to that question?

JUDGE BARNES: On the basis of sophistication.

MR. TOPKIS: It is a speech rather than a fact.

JUDGE BARNES: Can you rephrase the question in another way, Mr. Thurman?

By Mr. Thurman:

Q What is the level of technology required to produce industrial gasses in the United States?

MR. TOPKIS: If Your Honor please, I don't mean to be capricious, but you have to know how to put up the plant, I suppose, is the answer. But what does it advance us to know that? Is the witness supposed to say it requires a high level of sophistication or low level of sophistication or just a medium one?

MR. THURMAN: your Honor, I have never heard of respondent's counsel being allowed to make a speech. Why doesn't he give an objection and basis for his objection? He interrupts and asks the witness and tries to put words in the witness' mouth. It is improper.

JUDGE BARNES: This witness knows how to answer this question.

What is the level of technology required, Mr. Flamm, if you can answer that question.

THE WITNESS: May I clarify the question?

JUDGE BARNES: Yes.

THE WITNESS: Is the question what is the degree of technical expertise required to operate a plant or create a plant?

By Mr. Thurman:

Q To create and operate a plant in the United States to enter this market.

JUDGE BARNES: We are going to have an objection to the work "market." Enter the manufacture and production of industrial gasses and distribution of industrial gasses.

THE WITNESS: Here comes a hell of a self-serving answer. I believe it is a reasonably high level of sophistication.

By Mr. Thurman:

Q In 1973 in your business judgment did BOC possess the needed technology, the market expertise and the capital to enter in the production and distribution of industrial gasses in the United States?

MR. TOPKIS: Could I have that question back please, Your Honor?

JUDGE BARNES: Yes. Read the question back.

(The reporter read the question.)

MR. TOPKIS: I am prepared to stipulate that BOC possessed the technology and the finances needed to enter to some degree in the United States. I will spare the witness the necessity of paying us the compliment.

JUDGE BARNES: There was one other part to the question.

MR. TOPKIS: Yes, market expertise.

JUDGE BARNES: You did not stipulate to that.

MR. TOPKIS: I did not. I suggest until the witness has demonstrated to have extensive familiarity with BOC's operations, he will have difficulty in answering the question. The question is improper. It lacks foundation.

JUDGE BARNES: I think it does lack a foundation to ask about marketing, Mr. Thurman.

By Mr. Thurman:

Q Do you have a basis to know whether BOC possessed the marketing expertise to enter the United States?

A Well, BOC today has something in excess of 50 percent of its profits coming from off-shore the United Kingdom according to Mr. Smith's last report to his stockholders. Some of these off-shore activities have certainly taken place in the last 10 to 20 years and I would say the same marketing expertise required to enter those virgin markets, virgin for BOC, would probably apply to their prowess in entering the United States marketplace.

The marketplaces aren't that different as far as the end use technology is concerned.

By Mr. Thurman:

Q In the production and marketing of U. S. industrial gasses what is the present balance between supply and demand?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: What do you mean by that question, Mr. Thurman?

MR. THURMAN: Is there a shortage?

JUDGE BARNES: Is there a oversupply or shortage?

MR. THURMAN: Shortage of supply. Is there a shortage or overage to meet demand? Is there enough industrial gasses to meet demand in the United States?

JUDGE BARNES: As of what time?

MR. THURMAN: Presently or in 1973.

JUDGE BARNES: As of what time?

MR. THURMAN: Presently or in 1973.

MR. TOPKIS: I object to the question unless it is broken down gas by gas. It is entirely conceivable, I don't know, that the condition may vary from gas to gas.

JUDGE BARNES: Mr. Flamm, take Mr. Topkis' objection into mind in answering this question.

THE WITNESS: O.K. In the air gasses -- when I use "air gasses" I will be using terms such a nitrogen, oxygen and argon -- taking the United States as a whole, there is anywhere from a relatively tight to an allocation-type marketing situation.

JUDGE BARNES: During what period of time?

THE WITNESS: Right now and in the second half of 1973. It feeds the United States economy and it is as overheated as the United States economy is. In some of the other products, helium, there is no shortage, there is an oversupply; hydrogen, there is no shortage -- liquid hydrogen -- acetylene, someplace in the middle, it is reasonably balanced. It is not on an allocation basis and there is some excess capacity, not as much as hydrogen or helium nor as tight as the air gasses.

I think those are the principal gasses, Mr. Thurman.

By Mr. Thurman:

Q What percentage of Linde's shipments are made up by the air gasses, oxygen, nitrogen and argon?

A In terms of dollars, it varies apprxoimately, I would say, 75 to 80 percent.

Q How long have the air gasses been in short supply?

A I would say on a geographical basis there have been pockets of short supply dating back a year and a half to two years. Those are pockets.

Q Is Linde allocating industrial gasses to its customers?

A Some. By "some" I speak both of some gasses and some parts of the United States.

Q What gasses?

A Air gasses. The answer would hold for all the air gasses.

Q Has Linde's profitability in the United States industrial gasses charged since 1970?

A Yes.

Q What was the change?

MR. TOPKIS: If Your Honor please, if we are going into this, I suggest with due respect we are going to go into it awfully carefully. I have been told by counsel representing Linde that they don't want to go into it and I have been told by counsel supporting the complaint that I can't look at documents about it.

JUDGE BARNES: That's right. Mr. Topkis is going to have to cross-examine extensively on this subject matter, Mr. Thurman. If we had actual documents, we could introduce them in the record and put them in in camera.

MR. THURMAN: Your Honor, I do not believe that in light of this trial being expedited that we can afford to take the time to try to obtain these documents, the specific documents, from Union Carbide. If we subpoena, they certainly have an opportunity to prove to limit or quash and to appeal. Therefore, I don't think we have to be that exact. It is just whether it has improved or declined. That is all we are asking. If he wants to go into it further than that, let him try to get the documents.

JUDGE BARNES: I thought perhaps you may have had some of these documents in your industrial gasses investigation. I thought you had them in hand. It seems to me that was a request in your letter of demand to have these documents.

MR. LOAN: To clarify that point, Your Honor, he does have some documents in hand that deal with the subject of rates of return. However, these were documents that we claim are covered by confidentiality requirements. They are documents which we do not think are relevant to this case. All of these aspects have been covered by the appeal that we have filed to the Commission from Your Honor's ruling.

So, certainly we still have objections to the introduction of these specific documents into this hearing at this time.

JUDGE BARNES: I think rate of return might be relevant. Mr. Thurman indicates it is because he has raised it at this point.

MR. THURMAN: We think that overall performance is relative. The documents we have do not give any overall performance of the industry. We think that the witness certainly can testify and is certainly knowledgeable. There are such a few companies in this, they know what is going on. This man has been in the business for 25 years of his adult working life. Certainly he should be able to say whether the profitability has improved or declined in the last few years without digging into the sensitive material they have.

If we had complete industry documents that could give the performance of the industry as a whole, we would gladly introduce them, but we see no reason to introduce individual documents of individual companies.

JUDGE BARNES: I will permit the witness to answer that general question. I also am going to permit Mr. Topkis to inquire into it on cross-examination.

MR. WADE: I would object to the question on the ground that we don't have a significant way of cross-examining until we see the document which Mr. Doan referred to, which apparently exists in the Commission's files. Until we can be assured of having a reasonable way of cross-examining that very nice one-line answer and one-line question, I think the question should not be permitted. Therefore, we object to it.

JUDGE BARNES: I am going to permit it. It may be necessary at some future date to recall Mr. Flamm.

MR. WADE: Also we may move to strike if we do not get the document or move to recall Mr. Flamm if we do get the document.

JUDGE BARNES: All right.

MR. THURMAN: May I have a moment, Your Honor?

JUDGE BARNES: Yes.

(Discussion off the record.)

MR. TOPKIS: If Your HOnor please, with a question pending to the witness, I don't think it is proper for anyone to talk to the witness.

JUDGE BARNES: This is the witness' own counsel. If he needs to consult his counsel, he may do so.

MR. DOAN: This goes on the whole point of the confidentiality aspects of the line of questioning, which I think it is appropriate to discuss with the witness at this point.

JUDGE BARNES: I think it is appropriate for the witness to consult his own counsel.

MR. TOPKIS: I don't want to intrude on his confidentiality. If that is the subject matter of the conversation, I withdraw my objection.

MR. DOAN: That is correct. That was the subject matter of the conversation.

MR. THURMAN: Your Honor, we withdraw our question concerning profitability with this witness regarding Union Carbide. I would like to enter into a stipulation with Mr. Topkis if we don't bring up profitability, he doesn't bring up profitability if that is the way he wants it.

MR. TOPKIS: No comment.

By Mr. Thurman:

Q Mr. Flamm, what is the prognosis for the producing and distributing of industrial gasses in the United States as to growth?

MR. WADE: I object to that question. I don't know what gasses he means or what areas he means.

JUDGE BARNES: And I don't know what basis he is going to use. Is this some type of published study or is this the Linde Division's own prognosis? I don't know what you are talking about, Mr. Thurman. I think you will have to give us some background foundation questions.

By Mr. Thurman:

Q Mr. Flamm, do you have any basis to state what the prognosis of the industrial gasses industry will be as to growth?

MR. TOPKIS: Whose prognosis?

By Mr. Thurman:

Q In recent years?

MR. WADE: Objection.

MR. TOPKIS: I join in it on accumulative grounds. Whose prognisis and what does the phrase "recent years" mean?

MR. THURMAN: I wish he would make his objection and say what it is. I am asking him a basis for growth in the industrial producing and marketing of industrial gasses. The answer is "yes" or "no."

MR. WADE: In the United States?

MR. THURMAN: Yes.

JUDGE BARNES: What period of time?

MR. THURMAN: In recent years, I stated; in the next few years.

JUDGE BARNES: Can you answer that question? Do you have a basis?

THE WITNESS: Let me again break my answer down by the various products as it relates to the air separation products as to nitrogen-argon. We have projections over the next five years for growth in that particular product area. We also have some projections by product line.

By Mr. Thurman:

Q What are these projections?

MR. TOPKIS: These are Linde's projections that are being asked for?

THE WITNESS: That is all you are going to get is Linde's. Very approximately we project this physical volume growth in the atmospheric oxygen-nitrogen area, merchant oxygen-nitrogen area, something in the order of between 7 and 9 percent compounded over the next four to five years. In the argon area we project something slightly higher than that.

In the fuel gasses we project something lower than that, about half that as a matter of fact. Is that enough?

JUDGE BARNES: This is volume growth?

THE WITNESS: That is correct. These projections primarily are first round. They are permitted to assess our production and other capital requirements, hence it is a physical volume oriented market growth-type extrapolation.

By Mr. Thurman:

Q Has Linde's volume improved since 1970?

A Yes. Mr. Thurman, going back to your question since 1970, and I recognize I wasn't particularly complimentary on the Bureau of Census financial data, we put a fair amount of credibility into the volume data. As you will probably see there, the volumes have grown in the last three years.

Q Do you know if volumes have improved or increased since

1970 by the other members of the industry?

MR. TOPKIS: Is this physical volume or dollar volume?

MR. THURMAN: Dollar volume.

THE WITNESS: Only insofar as I see people's annual and quarterly reports.

By Mr. Thurman:

Q Has it increased?

MR. TOPKIS: I take it the witness is going to now tell us what he read in somebody's annual report. My objection is obvious.

JUDGE BARNES: All right. It is hearsay.

MR. THURMAN: Is Mr. Topkis saying annual reports are hearsay and not admissible? I will agree with him if that is what he is saying.

JUDGE BARNES. I think the witness' basis for knowing it is hearsay. Bring in these companies and ask them. That is the best evidence.

By Mr. Thurman:

Q Does volume growth reflect revenue growth or does revenue growth differ?

A There is not a direct correlation between revenue growth and volume growth.

Q I believe you said there is no direct correlation. Is there any correlation, if one rose, would the other one rise?

A As a general answer the answer should be "yes," but it is not necessarily so. One can have a large volume growth in a low revenue-producing gas and a reduction in a high revenue-producing gas and you could have greater physical volume and lesser revenue generated.

Q In a shortage situation would revenue grow more than volume?

A Would revenue grow more than volume? That is a very complicated question because of the myriad of products that are involved in the volume growth. You see, a significant part of our volume gowth occurs under contracts that are long-term contracts where the supply and demand has norelationship. You just sell some more out of an existing facility at an agreed-upon contract of five years ago. As a matter of fact, that is, what we call last block product actually goes at a relatively low price.

I am certain if you segment the marketplaces into merchant oxygen or merchant nitrogen, I could give you a more definitive answer. In general if you ask the question does revenue necessarily reflect volume growth in a shortage situation, it is more likely in a shortage situation, but I still cannot give a definite "yes."

Q In 1973 what companies did you consider to have the capital resources, marketing expertise, technical expertise and interest needed to enter into the production and distribution of industrial gasses in the United States?

MR. TOPKIS: I object to the qeustion, Your Honor. If I may, I would like to indicate the basis of my objection.

JUDGE BARNES: Yes.

MR. TOPKIS: The question, of course, of what companies had the capacity, the skill, the resources to enter the gasses business in the United States is at the heart of this litigation or it is one of the questions in this litigation. But the way to prove the fact, it seems to me, is not to call for a witness' opinion, however much I may respect the witness' experience and candor, because all we will produce then will be a situation where complaint counsel call 15 people and ask them which companies had the potential and we will call 15 people and they will say, I agree nine of them did and five didn't and the other two I never heard of, but I can tell you about six others, and we will really be building opinion upon opinion rather than fact.

It seems to me that the proper way to get this information is to examine the particular companies, the facts relating to those companies rather thancalling for such an opinion.

JUDGE BARNES: I believe the Falstaff case for one indicated this might be an important area of what competitors think about companies likely to enter. On that basis I am going to permit the witness to answer the question, but I would like to have the question reread to make sure it is proper.

(The reporter read the question.)

MR. WADE: I would like to object to that question because I do not understand whether he means the type of company that might build an air separation unit or someone who might sell a cylinder of helium about that size. I think the answers might be very different.

JUDGE BARNES: I am going to let the witness answer. If the question needs breaking down, I will let him do it. You may answer the question.

THE WITNESS: O.K. In the broadest sense, a company that might be not just a distributor of products, but one that would be integrated to the point where they would produce and market on a broad spectrum of products, I will try to direct my answer toward that type of question.

Your question didn't state, but is it meant to be those companies that are not today in the United States market?

By Mr. Thurman:

Q Yes, sir.

A Let me start by saying I assume for this discussion that Air Liquide is considered to be part of the United States market. In descending order of, I believe, demonstrated competency would be the British Oxygen Company, Ltd., either one or both of the two prominent German companies, Messer and German Linde, and, third, I would put a Swedish-based company, AGA.

Now there are other companies with technical and financial resources, I believe, around the world, but they have never shown to date any inclination to expand off-shore, off their home territory and these to a large extent are housed in Japan.

JUDGE BARNES: The Linde Company, German Linde Company, is that related to your company?

THE WITNESS: No, sir. Back in the early 1900s the relationship was we acquired some patents. We are permitted to use the name Linde in this country. German Linde, if they were to come here, is not permitted to use that name, and vice versa.

MR. DOAN: If I may add a further bit of history, one of the original inventors of the cryogenic air separation process was a German, I believe, by the name of Karl von Linde. It is his name that was given to the patents.

THE WITNESS: The name has enhanced in value since that time.

By Mr. Thurman:

Q Prior to BOC acquiring stock interest in AIRCO do I understand you consider these four companies as potential entrants into the United States market, are the most likely potential entrants?

A To my knowledge.

Q Prior to this acquisition of stock interest which of the four did you consider the most likely to enter?

JUDGE BARNES: I believe he named them in descending order.

By Mr. Thurman:

Q Was that in descending order?

A Yes.

MR. THURMAN: Your Honor, I don't believe we will be able to get through direct and cross-examination before the lunch hour. Would you like to break at this time or would you like to continue?

JUDGE BARNES: We can break now and come back at 1:30 or work until 12:30 and come back at 2. I am open to suggestions.

MR. THURMAN: I would just as soon break now and come back at 1:30.

JUDGE BARNES: All right. We will adjourn until 1:30.

(Whereupon, at 12 o'clock noon the hearing recessed, to reconvene at 1:30 p.m. of the same day.)

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AFTERNOON SESSION

1:30 p.m.

JUDGE BARNES: Are you ready to resume?

MR. TOPKIS: Yes, Your Honor.

ALEC FLAMM resumed the stand and testified further as follows:

DIRECT EXAMINATION (continued)

By Mr. Thurman:

Q Mr. Flamm, in 1973, were there any incentives for BOC to enter into the production and distribution of industrial gases in the United States?

MR. TOPKIS: Objection, Your Honor.

The profit motive, of course.

But what kind of question is that?

I object.

JUDGE BARNES: I think the question is too broad.

By Mr. Thurman:

Q In your business judgment, Mr. Flamm, would it be in BOC's economic interest to enter into the production and distribution of industrial gases in the United States?

MR. TOPKIS: Objection.

JUDGE BARNES: I think the objection is proper, Mr. Thurman.

Ask him specific things.

MR. THURMAN: I can lead him.

MR. TOPKIS: Your Honor, while our friends are caucusing, may I rise to request leave as between Mr. Wade and myself if one objects to the question that objection will inure to the benefit of the other without its being stated?

JUDGE BARNES: Is that satisfactory, Mr. Wade?

MR. WADE: Yes.

JUDGE BARNES: All right; you may have a joint objection.

By Mr. Thurman:

Q Are there any reasons that you know of, Mr. Flamm, that a company producing and distributing industrial gases in another market would want to enter the U. S. market?

MR. TOPKIS: Objection on two grounds.

First, the use of the term "U. S. market"; and the second, the form of the question generally.

JUDGE BARNES: I think we understand the U. S. market not to mean an antitrust market.

By Mr. Thurman:

Q Producing and distributing gas in the U. S.

JUDGE BARNES: Could I have the questionread back, please?

(The question referred to was read by the reporter.)

JUDGE BARNES: Is there a time period, Mr. Thurman?

MR. THURMAN: 1973.

JUDGE BARNES: I am going to permit an answer to that question.

You can answer that question yes or no.

THE WITNESS: I am trying to understand to what I should say yes or no.

Are there any reasons why a company might want to participate in the U. S. Market, in the U. S. industrial market?

MR. THURMAN: Yes; 1973.

THE WITNESS: There certainly are reasons why a company might want to enter the U. S. market.

By Mr. Thurman:

Q What are those reasons?

MR. TOPKIS: Objection.

JUDGE BARNES: I will permit him to answer.

THE WITNESS: I think to the extent that the U. S. market or the U. S. industry in toto represents a significant market for industrial gases, if one were dedicated to a world-wide industrial gas business it appears that the U. S. represents a very important segment of the marketplace that one should participate in.

By Mr. Thurman:

Q Do you know if BOC is dedicated world-wide to the industrial gas business?

MR. TOPKIS: Objection.

I don't believe the witness is qualified as a psychoanalyst.

JUDGE BARNES: I sustain that objection.

Mr. Flamm, were there any specific economic conditions in 1973 that would hae made market entry desirable by the company?

THE WITNESS: I don't think 1973 was so peculiar.

If the question is were there some peculiar circumstances, I don't believe 1973 was much different from 1972 as an example.

The supply-demand situation had improved but I don't believe that would be a real major criterion.

By Mr. Thurman:

Q How about over 1970?

A 1973 was better than 1970 by some substantial amount.

JUDGE BARNES: What do you mean by "better"?

THE WITNESS: Supply-demand relationship is what I was addressing myself to.

JUDGE BARNES: What is better?

THE WITNESS: The over-capacity that existed in the late '60's had been greatly diminished by the time '72-'73 came about.

By Mr/ Thurman:

Q Prior to BOC's acquisition of AIRCO's stock, do you know if BOC considered acquiring any U. S. industrial gas firms producing industrial gases in the United States other than AIRCO?

MR. TOPKIS: The question is: Did the witness know?

JUDGE BARNES: Yes.

MR. TOPKIS: I take it it calls for a yes or no answer.

THE WITNESS: The answer is no.

By Mr. Thurman:

Q Had you heard any rumors?

MR. TOPKIS: Objection.

JUDGE BARNES: The witness has answered your question. I don't think we should allow rumors.

MR. THURMAN: I should like to ask the question, not for the truth of the matter they were acquiring but the fact that he had heard rumors and thought were rumors were reliable.

JUDGE BARNES: Ask him if he received any information.

By Mr. Thurman

Q Did you receive any information prior to the acquisition of AIRCO stock by BOC, that BOC was considering acquiring other U. S. producers of industrial gases?

A Yes.

Q What is the basis?

A Rumor.

MR. TOPKIS: I move to strike.

By Mr. Thurman:

Q At the time that you received these rumors, did you have an opinion as to the reliability of these rumors?

MR. TOPKIS: Objection.

JUDGE BARNES: I think that is an objectionable question.

Mr. Flamm, what information did you receive? I can determine whether it is rumor or whether it is reliable. What information did you receive?

THE WITNESS: The information I received was a person describing a discussion another person had had with members of BOC and the subject of that discussion was possible acquisition.

JUDGE BARNES: That is a hearsay answer.

MR. THURMAN: Your Honor, this is not for the truth of the matter but that the members of the industry knew they were looking around. We intend to elicit testimony from the actual person that was actually negotiating, that they were acquiring. This was not truth of the matter.

JUDGE BARNES: His state of mind?

MR. THURMAN: Yes.

I think for that purpose this is admissible.

JUDGE BARNES: We will let the record stand just as it is.

By Mr. Thurman:

Q In 1973, Mr. Flamm, by what methods could BOC have entered into the production and distribution of industrial gases in the United States?

MR. TOPKIS: Objection.

JUDGE BARNES: What is the basis of your objection?

MR. TOPKIS: Just that it is an invitation to write a book.

JUDGE BARNES: I think the witness can state what methods were available to BOC to enter the U. S. market.

MR. TOPKIS: Presumably, Your Honor, there would be a separate method for each kind of gas at each level of distribution and, really, that is a book.

If we have to go into it, so be it, but I think we ought to recognize that we are opening a very wide door.

MR. THURMAN: I appreciate Mr. Topkis not stating what he thinks it should be but let the witness testify.

JUDGE BARNES: I will let the witness answer the question, if he can.

THE WITNESS: There are three generic methods one might choose to enter into the production and distribution of industrial gas business

One is the one I believe, the AIRCO-BOC relationship that BOC has chosen, namely, somehow acquisition of a major factor in the U. S. market. The other extreme by our semantics we would call a grass-roots entry into the marketplace in which one would lay down a plant and go into the business at the production level and distribution level and the distribution level could take a myriad of forms. It could either be just serving large industrial gas customers or it could be going into a distributor-type relationship where the end marketplace is served directly by either a distributor or by the producer. That one has a variation in which one could combine in what we call an on-sight plant in what we call the captive gas load, and I am addressing myself to air gases, a gas load in which one would combine that gas load for economic purposes with a liquid supply possibility and the intermediate one is the one I think that is probably bext exemplified by the recent entry into the market that liquid air has chosen.

Those are the various toe-hold entries in which one takes a small regional company and parlays it with another small regional company and from there builds a grass-roots plant for reasons of economy.

Those are the three broad-gauged answers to your question.

By Mr. Thurman:

Q As I understand it, this is your opinion that these are the three methods by which BOC could have entered the USA?

A These are three possible methods of entry.

Q I believe you mentioned Liquid Air had entered the market recently.

Do you know when they entered the United States market?

A It was in the second half of the '60's; '67, '68.

Q I believe you testified that they acquired some small firms.

A I think their initial entry was through the purchase of American Cryogenics. I think it was from Standard Oil of New Jersey. Subsequent to that nucleus, they acquired several smaller regional companies.

Q Do you know who the other companies were that they acquired?

A Yes.

Up in the Pacific Northwest, the Industrial Air Products which, while being small on a national basis, was quite a factor in their specific geographical market. More recently, Dye Oxygen and Gulf Oxygen.

Q Were any of the firms, Dye or Industrial Air Products, American Cryogenics, in the top eight producers in the United States at the time of the acquisition by Liquid Air?

A No; they were not.

Q In 1973, who were the two oargest world-wide firms in the industrial gas business?

MR. TOPKIS: Could I have that question read back, please?

JUDGE BARNES: Will you read it back?

(The question referred to was read by the reporter.)

MR. TOPKIS: Does that mean production of industrial gases? If so, I will have no objection although I think we will have representatives of those companies here in court and I think they might better testify.

JUDGE BARNES: All right.

Let us have it limited, Mr. Thurman, to production or sales.

By Mr. Thurman:

Q Production and distribution.

A To the extent one can gather that type of information out of annual reports, I would have to give an answer that it is more knowledgeable than just production and distribution.

I would have to answer that industrial gases and related products. By that, I mean such things as welding equipment and so on since it is difficult to get in an annual report or various security analysts' reports and get behind the numbers.

So, if you are willing to accept the answer in that context, I can answer the question.

Q Will you answer in that context?

A Lest I be challenged that Union Carbide, itself, is larger than either BOC or Air Liquide, the industrial gas portion of Union Carbide and treated that way I would put Air Liquide and BOC the top two, with Union Carbide being third.

MR. THURMAN: We have no further questions, Your Honor.

JUDGE BARNES: Are you prepared for cross-examination?

MR. TOPKIS: Yes, Honor.

JUDGE BARNES: Who would like to go first?

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CROSS-EXAMINATION

By Mr. Topkis:

Q Mr. Flamm, you listed for us a number of producers of industrial gasses in the United States. Do you remember that testimony this morning, sir?

A Yes, I do.

Q Do you happen to know there is a company called East Texas Oxygen producing industrial gasses?

A No.

Q It does not or you don't know?

A I don't know.

Q How about Superior Air Products?

A Superior Air Products, I believe, is a producer of air separation plants.

Q That is to say, they make plants and sell them to other people?

A That is what I believe it is, yes.

Q Let us talk for just a minute, Mr. Flamm, about these terms that we have been using up to now. You talk about air separation plant. What is an -- what does an air separation plant do, sir?

A An air separation plant is basically a piece of chemical process equipment that separates air into its individual constituents?

Q What are those constituents?

MR. THURMAN: Objection. That is outside the scope of the direct.

JUDGE BARNES: It will be helpful to me anyway.

THE WITNESS: The principal constituents are the ones we have been referring to as air gasses, oxygen, nitrogen and argon. There are some misuncule rare gasses that come into play

By Mr. Topkis:

Q Do I understand that an air separation plant takes air and squeezes it and when you squeeze it, the varying components of the air fracticrate out, at one point you get oxygen, another you get nitrogen and at another you get argon and if you continue the processes sufficiently, you will wind up with so-called rare gasses if your equipment is sufficiently sophisticated?

A That is a process. It is probably the most commonly used process. The processes you are alluding to is what we would call a cryogenic process. There are other processes that don't follow that particular chemical mode, physical mode.

Q For obtaining the same end product, that is to say, what we are calling atmospheric gas?

A Either product or all of those products.

Q Can you tell us what those processes are?

A Commercially there is an adsorption process.

Q A.D.?

A Yes.

Q What do you get from that?

A Oxygen and/or nitrogen. Rarely is it economical for argon.

Q How do you do it?

A By taking air, again, as the raw material and putting it through various types of adsorbance which would be molecular sieves or something that physically separates the constituents of the air by holding some and letting others pass through, and thereby enhancing the purity of the products you are trying to selectively adsorb.

Q Both of those, that is to say, the cryogenic processes and adsorption processes, will produce the same relative range of end product?

A The one that is of more general use, both economically and functionally, is the cryogenic process.

Q What makes one decide to use the cryogenic process rather than the adsorptive process?

A Economics.

Q Economics of scale? Who would use the cryogenic process and who would use the adsorptive process?

A The adsorption process at the moment is only applicable -- it is our opinion economically applicable to relatively small customers who are in an on-site mode and does not produce a product that makes sense for a merchant market.

Q So, somebody who wanted to produce atmospheric gasses for his own use on a relatively small scale might use the adsorption process, is that right? For his own use or an on-site relationship between us?

Q Right. By an on-site relationship you mean putting up a plant right next to a user?

A Captive.

Q Captive plant, O.K. Would a large user be served by adsorption process or would it be a small on-site user?

A Small.

Q So, no steel company using the basic oxygen process for making steel would have an adsorption plant supplying its oxygen, would it?

A That is correct.

Q Are there any other processes whereby atmospheric gasses may be produced?

A As far as the scale, the commercial scale, we are discussing here, the answer is "no." There is some laboratory-type or aircraft breathing type, but it is not pertinent.

Q So, the two commercial ones are the cryogenic process and the adsorption process?

A That is correct.

Q Now will you tell us please how you make CO_2, carbon dioxide?

A Not very well.

MR. [illegible]: Your Honor, objection. This is outside the scope of the direct. Unless Your Honor wants to hear it, it has nothing to do with complaint counsel listing who is producing these gasses, who is in the market.

JUDGE BARNES: It does seem to be a bit removed now from the direct to go into how each gas in made.

MR. TOPKIS: That is the whole point, Your Honor. Complaint counsel asked this man about industrial gasses, how are they sold, how much of them are sold. On cross I think I am entitled to demonstrate that they are not made by the same people and they are not sold to the same people and they are not used for the same purpose.

JUDGE BARNES: If that is the purpose of your question, I think you are probably correct. You may contimue.

MR. TOPKIS: That is exactly it. I so represent and I will demonstrate it in a moment.

By Mr. Topkis:

Q Can you tell us please how carbon dioxide is made?

MR. THURMAN: Your Honor, we will stipulate they are not made by the same process.

JUDGE BARNES: I am going to permit Mr. Topkis to proceed until I can find out what he is driving at, sir.

By Mr. Topkis:

Q Can you tell me please how carbon dioxide is made commercially, if you know?

A My definite knowledge is much, much less in the CO_2 area than it is in the atmospheric gas and some of the others which we market. You recall on direct we are a minuscule factor in the CO_2 area. However, normally CO_2 is a byproduct of some other process in which it is then purified and either liquified or created as a solid for transportation.

Q Am I right in believing that a lot of breweries generate CO_2 and sell it?

A I thought they -- you may be right. I thought they were more consumers than they were marketers.

Q Of CO_2?

A Yes.

Q Do they sometimes generate it for their own uses?

A It could be. I don't know.

Q Would I be well advised to go into another subject than CO_2 and get my enlightenment from someone else, meaning no disrespect?

A You could get far greater enlightenment from someone more prominent in the industry.

Q How about acetylene, sir? You make that?

A Yes.

Q I have seen somewhere that Union Carbide has 63 acetylene plants in the United States as of the end of 1973. Is that figure accurate?

A I don't know.

Q Is it possibly accurate?

A It is possible. It would not be included in the numbers I gave the court this morning in that when he would use a number like 63, that would be in essence what we call an acetylene generator. That is where one takes calcium carbide, adds water to it and gets acetylene.

Q One does that to get commercial utilization?

A From there one goes into cylinders for transportation and one does that for commercial utilization.

Q That has nothing to do with the cryogenic process or the adsorption process for generating atmospheric gasses, does it?

A That is correct.

Q Do you regard acetylene as an industrial gas?

A Yes.

Q Now argon, you said, is a product of the cryogenic or adsorption process, is that right?

A Yes.

Q How about carbon monoxide? How is that generated? That is an industrial gas, too, isn't it?

A It is one of the things we mutually usually decide to leave out in that it is one of the specialty gasses.

Q You do not regard it as an industrial gas or you do?

A Well, to the extent that we include specialty gas, I would include it. To the extent we do not include specialty gas, I would exclude it.

Q As a matter of your normal practice, do you normally include it or exclude it?

A We consider ourselves in the industrial gas business and we are in the specialty gas business, so I would have to answer we would normally include it.

Q How do you make carbon monoxide?

A I am not sure I know. We don't make it.

Q You don't make it?

A We don't make it.

Q It is not made by the cryogenic process?

A It is not made by the same cryogenic process as air separation. Cryogenic merely means "low temperature." I suspect there are processes that are cryogenic in nature.

Q It is not generated on one of those air separation towers, is that right?

MR. THURMAN: Objection, Your Honor. He has stated he doesn't know how it is made. He has answered the question.

JUDGE BARNES: He is asking him for a specific method. Can you answer that?

THE WITNESS: Yes, I can. It is not made off an air separation tower.

By Mr. Topkis:

Q It is made by the adsorption process you described before when you were telling us how atmospheric gasses were fractionated?

A No.

Q How about helium? Where does helium come from?

A The principal source of helium is from a cryogenic process, a different cryogenic process.

Q Different from the air separation cryogenic process?

A That is correct. In which natural gas is processed where helium might be contained in the low one or two or two and a half percent as a contained element in natural gas and is processed by the various large natural gas producers, helium is extracted, subsequently purified usually cryogenically.

Q Your company does not make any helium?

A We don't make any crude helium. By that the process I use described that takes it from 1 percent up to the high 90s. We do not make that. We may purify in its commercial form.

Q From the high 90s to a hundred percent?

A Yes.

Q Who are the companies who extract the crude helium from natural gas and bring it up to the 90s? Is that the oil companies?

A Natural gas usually. My limited knowledge, I think I mentioned three or four of them this morning. I mentioned Cities Service, Northern Natural Gas, Kerr-McGee, Kansas-Nebraska Natural Gas Company and I suspect there are two or three other majors.

Q Phillips by any chance?

A Phillips, I believe, is one.

Q There are possibly others.

A There are possibly others.

Q Do I gather any company that has a substantial supply of natural gas has the capacity to produce helium from it?

A Has the physical capacity. The economics wouldn't hold together at the moment to do that. As I mentioned this morning, there is a surplus of helium due to the cancellation of the Bureau of Mines conservation program.

Q Now krypton, that is one of those rare gasses that is in the atmosphere and is extracted by the cryogenic air separation process, as you described it here?

A That is correct.

Q Neon, sir?

A Likewise.

Q Nitrogen also is an air separation?

A Nitrogen?

Q Nitrogen.

A That is the largest constituent in air.

Q Actually just to go back to my high school chemistry from which I never advanced, air is about 80 or 81 percent nitrogen and the balance for all practical purposes is oxygen, with argon and the others?

A Argon when you and I went to high school used to be a rare gas. It is not rare any more. There is virtually 1 percent argon in the air, .93 percent, 79 percent nitrogen and the remainder oxygen.

Q Are there any processes other than the cryogenic air separation process and adsorption process that you described earlier for generating nitrogen?

A For generating nitrogen?

Q Yes, sir.

A Yes. Some people can generate nitrogen from cracking such products as ammonia into its constituents, nitrogen and hydrogen.

Q Is that a standard commercial practice?

A That is done by some people in some of the annealing gas areas.

Q What is annealing gas?

A Eith to blanket or to anneal. It is in the metallurgical area in which you need a certain atmosphere to process the steel or whatever it is you are trying to process. In other others, it is an environmental -- that is the wrong word -- it is an atmospheric control.

Q Actually the principal property of nitrogen is that it is inert, isn't that right? And that is what you use it for industrially?

A The principal use of gaseous nitrogen is its inert characteristic. However, in our particular industry it has another benefit and that is its refrigeration capabilities.

Q And those you would describe as its two principal industrial uses?

A Yes, I would say so.

Q Let us come to nitrous oxide. Is that an industrial gas?

A As I testified this morning, it is a line item in our specialty gas area and to the extent that we include specialty gasses, industrial gas, it is an industrial gas. We are not a significant factor and don't ask me how we produce it.

Q Is it made by the air separation cryogenic process?

A No.

Q Is it made by the adsorption process to fractionate air fractions?

A No.

Q Is it made by any process that you have described up to now today?

A If it is, it is without my knowledge.

Q We discussed oxygen. Xenon is another rare gas?

A Yes.

Q My friends called to my attention I left my old friend hydrogen off the list. How do you generate hydrogen?

A You can either take a byproduct from a petrochemical or oil-producing plant or you can take natural gas and crack it and recover hydrogen. Normally those processes, after you take the raw materials I described, are a cryogenic process.

Q But you can't get hydrogen out of the air by an air separation process?

A No.

Q Nor can you get it out of the air by an adsorption process?

A No.

Q Nor can you derive it by any of the processes that we have discussed up to now?

A Only insofar as cryogenic is a generic term, then you could.

Q Now, sir, let us go to the uses of these materials for a moment. Oxygen, I am informed, is widely used in hospitals as something that you give to a patient in the course of anesthesia, is that right?

A That is correct.

Q Suppose you gave that patient instead of oxygen, nitrogen, what would the consequences be?

Let me put it this way. How long would it take him to die?

A If he breathed it long enough, he would die.

Q If he went without the oxygen?

A If he went without the oxygen, he would be in deep trouble.

Q Let me ask you if the same consequences would follow if you gave that unhappy patient acetylene?

A Maybe even faster. I don't know.

Q Would argon be terribly good for his health?

A No.

Q Carbon monoxide?

A No.

Q Carbon dioxide?

A No.

Q Is that correct, among the industrial and specialty gasses we have been discussing, oxygen is the only one which can be given to a patient in the hospital for the purposes for which oxygen is normally given to such a patient, is that right?

A That is correct.

MR. THURMAN: Your Honor, I object to this line of questioning. We have already stipulated that we are not going into submarkets. That is what counsel is trying to break down and it is not relevant to this case. This is not relevant and it certainly should not be allowed to take up this court's time with further examination along these lines.

JUDGE BARNES: I think the production part of your questioning might have some relevance, Mr. Topkis, but what does this customer usage have to do with it now?

MR. TOPKIS: As I understand a market, Your Honor, it is a place where substances which are reasonably interchangeable for use are bought and sold. It will be my submission that none of these is reasonably interchangeable and that in consequence to lump them all together and call them a market makes no more sense than it would to lump all foodstuffs together from salt to pepper through sugar, molasses and rolled oats, and call that a market.

You get entirely different consequences from the use of each. They are made by different people, sold to different people for different processes.

MR. THURMAN: Your Honor, Brown Shoe does delineate a relevant submarket within an overall market. He should go to Philadelphia National Bank, Spalding, other cases where groups of products are sold. Certainly a baseball glove is not used with a tennis racket.

JUDGE BARNES: Mr. Thurman, you are asking me to make a final judgment on the first day of hearing as to what the relevant market is. I can't do it.

MR. THURMAN: We stipulated that we were not alleging submarkets within this market. So it is not relevant to this complaint.

JUDGE BARNES: Mr. Topkis is not necessarily proving a submarket. He is showing there is no market at all or he is attempting to show there is no market at all.

MR. THURMAN: I stipulate they are not substitutable in most cases.

JUDGE BARNES: Well, we can't stipulate all the testimony.

MR. THURMAN: We would have liked to when I was on direct examination.

JUDGE BARNES: You should have gotten the stipulation together before we started the trial this morning. I am going to permit this line of questioning to continue until I learn more about the case. Maybe at some future date we can call a halt to some of it.

You may proceed, Mr. Topkis.

By Mr. Topkis:

Q Mr. Flamm, is the principal use of oxygen today industrially in steel-making?

A On a volumetric basis the answer is "yes."

Q Does carbon monoxide play a significant role in steel-making?

A No.

Q Could you use carbon monoxide or argon or acetylene or helium or hydrogen interchangeably with oxygen in steel-making?

A In general, no. In some narrow segments possibly.

Q Extremely narrow?

A Yes.

Q I understand that oxygen is used extensively in glass-making, is that correct, sir?

A Yes.

Q For the uses to which oxygen is put in glass-making are any of the industrial gasses that we have been discussing interchangeable?

A You are pursuing the oxygen? In industrial gasses do we include air?

Q No, sir, unless you want to tell me that air is an industrial gas which I haven't heard before?

A We obviously sell air as we do these other products. Now if you exclude air, then the answer is "no." However, if you include air, the answer is air can be substituted.

Q Air can be substituted in glass-making for oxygen?

A And for steel-making. The various oxygen questions you have been asking, air is a viable substitute.

Q Air is a substitute for oxygen in steel-making, is that correct?

A Yes.

Q Hasn't the great advance in steel-making of the last quarter century been the substitution of oxygen for air in steel-making by use of what is called the basic oxygen process?

A That proves it is a substitute.

Q Oxygen is better than air?

A Those people who have gone to the oxygen process feel that oxygen is better than air.

Q Nobody among the steel companies who have gone to oxygen would go back to air if they were in their right mind?

A I have a good customer who is about to do that, so I will not answer. I would not go back to air from oxygen.

Q You certainly would not go to acetylene?

A That is correct.

Q Now coming back, I think we were on glass and you told us that oxygen substituted for glass?

A Is that what?

Q Oxygen -- I am sorry. I will start again. We were talking about glass-making. You said that oxygen is used in glass-making?

A That is correct.

Q You told us also that air might be used also in glass-making?

A The same relationship as with steel. Oxygen is normally a substitute for air.

Q And normally a preferred substitute for air?

A Not as clear-cut as in steel-making, but those who use oxygen it is a preferred substitute.

Q Now nitrogen is used extensively in glass-making, is that correct?

A That is correct.

Q Instead of using the nitrogen in glass-making could you use acetylene?

A No.

Q Could you use for the same purpose any of the industrial gasses that we have discussed today?

A Could you use or could you economically use?

Q Economically use.

A No, I don't think so.

Q Now let us talk about food freezing. Nitrogen is used extensively in food freezing, isn't it?

A Yes.

Q Can you use acetylene for the same purpose?

A No.

Q Can you use any of the industrial gasses which we have been discussing for the same purpose with the exception of carbon dioxide?

A Carbon dioxide is the logical substitute.

Q That is correct. The development in the food freezing business in the last 20 years has been the substitution of nitrogen for carbon dioxide, isn't that right?

A No. I think the development has been the substitution of nitrogen and CO_2 for mechanical refrigeration.

Q Nitrogen is used in liquid form in refrigeration in food freezing, is that right?

A That is correct.

Q CO_2 is used in what form?

A Liquid and solid.

Q Typically in solid?

A I think its larger volume is in solid, yes.

Q Would I be right in suggesting that typically one uses carbon dioxide in freezing operations which are relatively small in scope and one uses nitrogen in freezing operations which are much larger?

A I am afraid that is too simple. You could find small and large for either of those gasses, but it is more the characteristic of the food that you are processing.

Q Let us take the small trucks. Take a Good Humor truck.

MR. TOPKIS: Your Honor, do we have Good Humor trucks in Washington?

JUDGE BARNES: Indeed we do.

By Mr. Topkis:

Q Good Humor trucks are refrigerated with solid CO_2 typically?

A Yes.

Q You would not refrigerate one with liquid nitrogen?

A You are into another submarket.

Q That is your term, not mine.

A That which you are describing I don't consider food freezing.

Q O.K. That is food preservation?

A Yes. It is in transit preservation, whatever the state it was in you are trying to preserve it. Nitrogen and CO_2 are both used for in transit refrigeration.

Q Suppose I am a food freezer and I have a plant that is geared to use carbon dioxide as my freezing agent. Can I take that plant and convert it to nitrogen use or do I have to get new equipment?

A All I know is what I read in some of the brochures.

Q Forget it. It is not your area of specialization.

A I know that people have substituted, as indeed have we tried, nitrogen for CO_2 with very minor variation, if any, to the equipment. That it is being used, but that is a real exception rather than the rule.

Q It is not the usual practice?

A That is correct.

Q Fine. Now liquid oxygen and liquid nitrogen are extensively used in the space program, are they not?

A Not as extensively as they used to be.

Q To the degree that the space program is still an operating phenomenon?

A Yes.

Q Those are the two principal gasses used?

A Hydrogen.

Q Hydrogen and oxygen?

A And nitrogen.

Q They are the principal gasses?

A That is correct.

Q In the uses that those gasses have in the space program they are not interchangeable, are they?

A Certainly nitrogen is not interchangeable with either hydrogen or oxygen. The general answer is "No, they are not."

Q When NASA orders one, it won't take the other?

A Not knowingly, that's right.

Q And surely none of the other industrial gasses that we have been discussing would be accepted by NASA instead of one of these three?

A That is correct.

Q Now in various chemical processes liquid oxygen, liquid nitrogen and argon, all have their function, do they not?

A Yes, they do.

Q Typically, however, they are not interchangeable in the chemical processes?

A No, they are not.

Q Now you told us about the organization called the Compressed Gas Association. Do you remember your testimony about that this morning?

A Yes.

Q Your company belongs to that and the U. S. Steel Corporation belongs to that also, don't they?

A The U. S. Steel Corporation?

Q Yes.

A You want a "yes" or "no" answer?

Q Yes.

A Yes, they belong.

Q And the Swedish company that you mentioned this morning, AGA, they belong to the Cumpressed Gas Association, don't they?

A If it says so, they do. I don't recall. I know U. S. Steel does. The fact that I don't recall whether they do or not, I believe that rather than my memory ----

Q I am holding in my hand a membership roster of CGA.

A That's right.

MR. TOPKIS: Your Honor, we have not indicated this as an exhibit we propose to offer. I did not expect the direct examination to be the way it was. I will be delighted to reserve it for my own case.

JUDGE BARNES: You might reserve it for your own case. Could we have a little more relevance of what membership really is?

MR. TOPKIS: Fine. I will be delighted, Your Honor.

By Mr. Topkis:

Q You mentioned this morning various producers of industrial gasses. Is Puritan-Bennett of Kansas City to your knowledge a producer of industrial gasses?

A To my knowledge they are not a producer of atmospheric gasses. They are primarily, as you know, in the medical market and to the extent that such things as nitrous oxide is a market, I do not know how back integrated they are. I believe they are a producer of industrial gasses, but not in the atmospheric gas area we have been discussing today.

Q Let me ask you henceforth to treat industrial gasses as broadly as the list that I have been giving you before, all the specialty gasses, the rare gasses, the fuels and the fuels are principally propane and what is the other one?

A MAPP, propylene, various exotics.

Q How do you spell that?

A MAPP, propylene, propane, acetylene, some mixtures that some companies use like Apache and God knows what else.

Q How to your knowledge does a company called National Welders Supply produce any industrial gasses?

A Yes, sir.

Q And a company called Midwest Solvent in Atchison, Kansas?

A I don't know.

Q How about Carbonate Industries of Orlando, Florida?

A Do they produce?

Q Yes, sir.

A I don't know.

Q SEC Corporation of El Paso, Texas?

A Before we go on, if someone has an acetylene generator in this discussion, is he a producer?

Q Indeed he is.

A You have a long list.

Q That is the thrust of my question.

A That is the reason when I was asked today to name the top eight, I said I would exclude all these people who would have acetylene generators in the back yard. I do not know a minuscule portion of them.

Q There are a lot of people who have acetylene generators?

A There are, indeed.

Q Are there similarly a lot of people who have nitrogen generators?

A There is a relative number here. An acetylene generator is usually owned by someone who is in the marketing of acetylene. A nitrogen generator is usually serving a consumer. Hence he is the market at that point and is owned by someone else.

Q Going back to the U. S. Steel for a moment, is U. S. Steel a producer of industrial gasses?

A Yes.

Q How many air separation units do they have to your knowledge?

A To my knowledge they have air separation plants?

Q Yes, sir.

A Four.

Q Your company built some of them or all of them for them?

A My company built two of those and AIRCO-BOC built two of those.

Q They are the so-called air separation towers?

A They are the cryogenic air separation plants.

MR. TOPKIS: Your Honor, at an appropriate moment we will show the court a picture of one of these air separation towers, but for present purposes I am right, am I not, in believing that it is a tower?

THE WITNESS: Among other things. The most prominent thing you see from the road is a tower.

By Mr. Topkis:

Q Next to it you see a big round thing that is a liquefier or something like that?

A No. What you see are heat exchangers. That round thing that is in the heat exchangers, that takes the air from ambient temperature down to cryogenic temperatures, the two principal elements are heat exchangers and what you would call the disilation tower.

Q Just so that we may advise His Honor of what kind of scale we are dealing with here, I am advised that your company has in the process of construction right now a very large air separation plant, is that right, some 2,000 tons per day capacity?

A I wish it were in construction. It is in engineering.

Q It is in engineering but it is down the road,a short way?

A It is authorized.

Q That will be the largest in the country?

A That will be the largest single train in the country.

Q By train you mean --

A Single element from the air compressor right through as contrasted with breaking it into several segments.

Q That is two thousand tons a day?

A Of oxygen.

Q Any nitrogen as well?

A Some, yes.

Q In addition to the oxygen.

A Yes, sir.

Q And some argon?

A Not yet authorized but it will have the capability at some future time to produce argon if it makes economic sense.

Q That being the largest. That is the smallest air separation tower in operation today that you can think of?

A Ours.

Q All right.

A Ten tons per day.

Q You built a couple of air separation plants for U.S. Steel?

A Yes.

Q How big were they?

A Approximately 500 tons per day each, of two.

Q Were they at the same location?

A They were at the same location, yes.

Q Where was that?

A In south Chicago.

Q Servicing the U.S. Steel Mill in southwest Chicago?

A That is correct.

Q Can you tell us how they were set up? Were they immediately adjacent to the steel mill?

A They were on steel mill property.

Q There was a pipeline running from the air separation plant right to the mill?

A It was on steel mill property. If you have ever been in a steel mill you will see oxygen lines running all over the place. This feeds into their U.S. Steel owned pipeline complex.

JUDGE BARNES: Are these your plants built for U.S. Steel?

A No. We built for U.S. Steel. They own the plants.

JUDGE BARNES: That is true of the other two that

U.S. Steel owns, is that right?

THE WITNESS: My understanding is -- the answer is pretty certainly yes, the two that Arco-BOC sold them, the answer is yes.

By Mr. Topkis:

Q What other steel companies own air separation units of their own?

A U. S. Steel owns two more in Pittsburgh, Monongahela River. They own two there. I suspect there are some others around. I can't think of them .

Q What is that Detroit steel company --

A It is not a steel company. Ford owns their own oxygen plant.

Q They own their own steel mill, don't they?

A Yes.

Q And they use the oxygen plant to supply the steel mill?

A Yes.

Q McLouth Steel is in Detroit.

A That is right.

Q They have their own separation plant?

A Y es.

Q Did you build that for them?

A No.

Q How about Wheeling-Pittsburgh Steel?

A Yes, I think they own their own.

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Q Any others you can think of?

A No.

Q How about Bethlehem?

A I think they are all on-site supply.

Q By on-site supply you mean, I take it, a plant put up by an atmospheric gas company immediately adjacent to the steel mill which has a long-term contract to supply that steel mill with oxygen. Is that right?

A From that plant.

A Is that right?

A That is right.

Q There is a steel company called LeTourneau in Longview, Texas. Do they have their own oxygen plant or plants?

A I don't know.

Q Do you have an oxygen plant supplying them on an over-the-fence basis?

A If we do I don't know about it. I may be embarrassed tomorrow.

Q Incidentally, by over-the-fence, that is an industry term?

A It think so. It is equivalent to on-site.

Q Both of them mean an air separation plant immediately adjoining a steel plant?

A In other words, if we owned the plants at U.S. Steel, South Chicago, even if it were on their property it would have the same nomenclature applied.

Q How about National Steel? Do they own any of their own air separation plants?

A Great Lakes is National. They do not. There may be one in the Pittsburgh area, perhaps.

Q It has been suggested to me that they have an operation at Ecorse, Michigan, where there is one of your plants, and a much smaller plant of their own.

MR. THURMAN: Objection to that line of questioning as to relevancy. It is outside the scope of the direct. Everything on direct was produce and distribute. Nothing shown that these companies distribute or sell in the open market. It is not relevant. It is outside the scope of the direct.

MR. TOPKIS: The question on direct was produce or distribute. That is exactly why I am asking these questions.

JUDGE BARNES: I will permit you to continue, Mr. Topkis.

THE WITNESS: To begin with, we have more than one plant there.

By Mr. Topkis:

Q At Ecorse?

A At Ecorse. If they have one which I am not aware of, and that could well be before my involvement in this business, I am not knowledgeable that they are operating it.

Q Do you happen to know about National's operation at Weirton, West Virginia?

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A I know it exists. I know we do not supply it.

Q You don't know whether or not they supply their own oxygen?

A They might. I am just not certain.

Q How about companies outside the steel industry which produce atmospheric gases, Mr. Flamm?

Let's take, for example, El Paso Natural Gas. Do they produce any atmospheric gases?

A I don't know.

Q It has been suggested to me that they produced hydrogen for use in ammonia.

A I think that is right. I don't consider that atmospheric gas.

Q Hydrogen?

A We agreed atmospheric gases are oxygen, nitrogen and argon.

Q I mean industrial gases. They do make hydrogen.

A I believe they do, yes.

Q We discussed the Ford Motor Company. How about American Cyanamid?

A It could be. Maybe I can help. There is probably a list of 50 companies in the chemical industry that produce these as raw materials for their own processes, as building blocks. It could be hydrogen, it could be CO, it could be oxygen. There are a myriad of companies. You could go down the list. I will know some and not others. I suspect your information is better than my memory.

MR. THURMAN: I object to further examination along this line. I suggest that with Mr. Topkis testifying and the witness agreeing in some areas that he is not familiar with and certainly for reliable evidence he will have to call these companies that are selling on the market.

THE WITNESS: Excuse me. If you are asking are these people selling on the market or are they manufacturing or consuming, themselves, I was answering the latter question.

By Mr. Topkis:

Q I am asking whether they produce. And that is the way you have been answering.

A That is the way I have been answering.

Q You have told us just a moment ago there were a great many chemical companies that produce various industrial gases. Does that sum it up in brief terms?

A I think so. In other words, by chemical processes this is not so sophisticated a process.

Q So too with petroleum companies. They too produce industrial gases.

A Particularly as they are involved in the petrochemical end of it.

Q For their own purpose and others?

A For their own purpose, certainly. I know knot of the others.

Q To sum up would it be accurate to say that these petroleum companies and these chemical companies have the technological know-how to produce industrial gases in whatever volume they want?

A To produce?

Q Yes.

A Yes, sir.

Q And I suppose you would agree with the suggestion that Gulf Oil or Exxon or Mobile or Cities Service, or any of the other large petroleum companies, have the financial resources to go into the production of industrial gases if they were so minded. Is that right?

A Financial resources, I would dare say yes.

Q That would be true also of a great many chemical companies?

A Chemical and steel.

Q And steel as well.

A Yes.

Q Now, sir, you told us a little while ago that your company built and sold air separation units.

A That is correct.

Q That is one of your major lines of activity, is that correct?

A No, it is not.

Q I have perhaps undue respect for you but you told us that you spent a good deal of time in that field of activity. It is a field of activity of Union Carbide, is that correct?

A The building and selling to the outside world of air separation plants is a field of activity and a rather minor one.

Q How many did you sell last year, in 1973?

MR. THURMAN: Objection. This is not relevant. It is outside the scope of the direct. Industrial gases is the market alleged in the Complaint, not the air separation plants.

JUDGE BARNES: These plants I presume produce industrial gases?

MR. THURMAN: We delineated the market. We did not ask about air separation.

JUDGE BARNES: Mr. Topkis is trying to delineate the market his way. So we will have to give him an opportunity.

Q He does not have to show the market his way. He just has to show we are wrong on our market.

JUDGE BARNES: Perhaps that is what he is trying to do.

THE WITNESS: So far we have clearly been speaking of the United States?

MR. TOPKIS: Yes, sir.

THE WITNESS: One or two.

By Mr. Topkis:

Q Who else is in the business of building and selling air separation plants in the United States?

A In addition to ourselves, Air Products, U.S. Liquide Air.

No, that is not true, that is not what they call themselves, it is a subsidiary of Air Liquide. There is Lotepro, which is the U.S. title of German Linde, as their hardware division; Superior Air Products that we spoke of before.

Q Superior Air Products?

A Right. There is a little outfit out on Long Island I know was in existence and I think still is, called Process Plants. From time to time AGA, although I haven't seen them; they have the capability but I have not seen them. I would assume BOC.

Q How about an outfit called Hydrocarbon Research, Inc.?

A I don't think they are in existence any more.

Q They did build an oxygen plant for Wheeling Steel?

A About a decade ago.

Q You mentioned two plants that BOC built for U.S. Steel, or BOC-Arco, in their joint venture which we will discuss subsequently, Your Honor.

Has BOC to your knowledge built any other plants in the United States?

A I believe they built one for Victory in Texas.

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Q Mr. Flamm, let me ask you this question:

Suppose I wanted to have an air separation plant built for me at a location in the continental United States, somewhere in the Midwest. Would I have any difficulty in finding a number of companies delighted to plan and design and build a plant for me?

A No.

Q And, Mr. Flamm, if I were interested in having a company build and operate an on-sight plant for me but maintain ownership in that company, would I have any difficulty ingetting companies to do that for me?

A Maintain ownership of the plant, you mean?

Q Right.

A The answer is no; you would not have difficulty.

Q There would be a number of bidders?

A There would be a number of bidders.

Q Indeed, competition for such business is quite widespread; is that right?

A Yes; it is.

Q Now, let me ask you this, sir:

Suppose I am a distributer of industrial gases.

First, tell us what a distributor is. What is his function? You used the term this morning. Can you define it for us?

A Yes.

A distributor is basically an extension of a distribution arm of the industrial gas marketplace. They are basically marketers and distributors of industrial gases and usually weling equipment and supplies, welding supply distributors. That constitutes most of the distributors.

Then you have some other specialty distributors, be it cyrogenic distributors or medical distributors.

The distributors I am most familiar with are basically marketers and distributors of industrial gas and welding and related equipment.

Q Let us suppose I am a distributor of industrial gases in Chicago.

Will there be a number of industrial gas producers from whom I might buy industrial gases?

A That is possible.

Q You said that today is a time of a little shortage in industrial gases; is that right?

A Well, yes; today is a time of some shortage but the volumes that a typical distributor consumes, you can go through all sorts of gyrations with distributors and the amount of physical volume you would save by allocating that market place is minuscule compared to what you might save by just allocating one large customer.

Q I am afraid we have lost contact.

A Okay.

that there is a good deal of competition at the level of supplying distributors among industrial gas companies?

MR. THURMAN: Objection, Your Honor.

I believe competition is used in a legal sense and there is no qualification of the witness being a lawyer.

JUDGE BARNES: Do you understand the meaning of the word "competition", Mr. Flamm?

THE WITNESS: I thought I did.

JUDGE BARNES: You may answer the question.

MR. THURMAN: The further objection is the vagueness of the characterization of competition.

JUDGE BARNES: Let me have the question read back so that we can see where we are.

(The question referred to was read by the reporter.)

JUDGE BARNES: A good deal is a little vague.

We willsay active competition.

THE WITNESS: In the context that you asked the question before, if a new, potentially good distributor were to set up in a marketplace, might he get satisfactorily supplied by some producer? My answer to that is yes.

To the extent that distributor, a good Linde distributor, becomes a reasonably on-going relationship between us, if we supply him well at fair prices and he reaches that particular marketplace effectively, there is relatively minor competition at that level.

Merely because there is a shortage of industrial gases, I think you were trying to suggest by that question that as a result of that a distributor might not get it from Company A; therefore, he might go to Company B. To my knowledge, I know we are not allocating to distributors.

Q A distributor who is one of your regular customers is getting what he needs?

A That is correct.

Q Suppose today a distributor or a new man wanted to set up a distribution business in Chicago.

Would he be able to get himself supplied with industrial gases?

A I would think so.

Q Is that true in Pittsburgh, also?

A I would think so.

Q Boston, also?

A Yes.

Q Detroit?

A Yes.

Q Birmingham, Alabama?

A Yes.

Q For the major industrial areas of the country that would be true; is that right?

A I would think so.

Q Would it be accurate to say, as a matter of fact, Mr. Flamm, But, in answer to your question, can someone come into the marketplace, if that is what you mean by competition, will he be satisfactorily supplied and, as such, does competition exist the answer is yes.

By Mr. Topkis:

Q Now, in dealing with distributors, do you deal with them on the basis of long-term contracts or short-term contracts?

A Short term.

Q How long is the average tenure?

A Of the contract or of our relationship?

Q Of the contract, sir.

Are they cancellable in 90 days' notice?

A I think that is the number. It is either 90 or 120 days.

Q How are the price terms set in your contracts with distributors?

A How are the price terms set in our contracts with distributors?

Q Yes.

A Well, in the case of the various welding supplies, there are published prices, list prices less a distributor discount.

In the case of various gases, we have been grouping our distributors as far as commonality of market so that that market which they serve at the level we come in is a constant or a similar pricing, one or the other.

Q You establish the price?

A We establish the price.

Q I read in the newspaper last week or the week before that Linde had promulgated a price increase of five per cent or something like that; is that right?

A If you read what we wrote, it was more than five per cent.

Q Good.

What was it?

A Between 10 and 15 per cent.

Q Was that quickly followed by your competitors?

A Well, reading the papers I read the next day that AIRCO was coming out with a price increase. I don't know at the moment what their schedule is compared to us in that there are a myriad of elements that come into the price schedule: size of tank, distribution and the like. That is the only one I read about was AIRCO.

Q Is the normal practice in the industrial gases field that the --

Well, first, your oxygen doesn't differ from AIRCO's oxygen, does it?

A No.

Q Except it has a Linde trademark on it?

A That is correct.

Q It doesn't differ from Air Liquide's oxygen or any other person's oxygen?

A That is right.

Q The same thing is true of all the other industrial gases. They are sold at commercial levels of purity?

A That is correct.

Q Is it the normal industry practice that one company's price parallels another company's price and that you really compete with each other in service?

A Oh, it varies. There is price competition.

Q There is price competition?

A Yes; indeed.

Q A vigorous level of price competition, would you say?

A Yes; I would say when we go out there, when companies such as Linde and AIRCO and Air Products, as far as the customer is concerned, they argue their service is equal, I would say there is a fair amount of vigorous price competition.

Q Now, going back for a second to the situation where you told us before that if I were an industrialist interested in having an on-site air separation plant built for me by you or one of your competitors, you told us, I think, there would be a number of companies bidding for that business.

A I would think so; yes.

JUDGE BARNES: You named those companies earlier, didn't you?

THE WITNESS: Yes; I did.

The reason I hesitate is that there is no guarantee that every company will bid on every plant because the plant that is specified may come close to your standard and may be totally unique to my standard. Hence, some companies would bid on some and some would not bid on others.

By Mr. Topkis:

Q Normally, there would be a multiplicity of choices?

A I would be surprised if you could not get three or four people bidding on a given opportunity.

Q Using the term you used before, "active price competition", or "vigorous price competition", has it been your experience that before putting up such on-site plant and operating them and supplying industries with the output of such on-site plants there is vigorous price competition?

A Which are you referring to now, the on-site or sale of the physical hardware, or both?

Q On-site.

A On-site?

Q Yes.

A Yes; there is vigorous price competition.

Q I think it has been said somewhere, Mr. Flamm, and correct me, please, if I err, that in the competition or in the vigorous price competitionfor the supplying of such on-site plants and their output the price received by the gases company tends to approach within a percentage point or two the cost to the gases company of the capital involved; is that correct?

A May I ask my counsel if that is part of the privileged type of discussion?

Q I am not asking you about Linde's experience, sir, of yesterday. I am asking you as a matter of general history and practice and expectation.

MR. THURMAN: Objection, Your Honor.

This is exactly what Mr. Topkis would not allow on direct.

JUDGE BARNES: I take it your question is a company who builds its own plant would it cost approximately the same as it would to have an outside supplier.

Is that your question?

MR. TOPKIS: That is part of it.

The additional part is this: It is my understanding that the price competition is so vigorous in this field among the companies which will build a plant next to yours and operate it for you that no company gets very rich out of putting up such a plant.

JUDGE BARNES: I think when we speak of building air separation towers we are beyond the scope of the complaint here. The fact that towers are built may have relevance but not the price competition in building of towers.

MR. TOPKIS: It is not the price competition in the building of the towers. It is the price competition in the supply of the gas that comes off the towers.

It is my understanding, and perhaps I can put it in the form of a question to the witness.

Mr. Flamm, name me the last company adjacent to whose plant you put in an air separation installation.

JUDGE BARNES: Linde-owned?

MR. TOPKIS: Linde-owned.

THE WITNESS: How about U. S. Steel?

By Mr. Topkis:

Q You made a contract with Steel under which you agreed to sell them a certain number of hundreds of tons of oxygen per day off that plant?

A That is correct.

Q My question to you is this, sir: Using that as typical and without invading the privacy of your relationship with U. S. Steel, when you negotiate such deals with large industrial concerns do you not find that the price competition which you have with other people who can similarly supply such plants to U. S. Steel and such users is so intense that the profit margin that you experience is within a point or two of your capital cost?

MR. THURMAN: Objection.

It is an improper question. It is outside the scope of the direct. There is nothing on direct that would prompt a question on profit.

There is no foundation of the knowledge of the industry as far as their prices.

JUDGE BARNES: I am going to sustain the objection because he did not go into rate of return on direct.

The question is very general, in any event.

MR. TOPKIS: Your Honor, the witness did testify that he did view BOC as a possible entrant to this field.

I am attempting to demonstrate through his testimony that the margin of return which BOC or any other company contemplating entry into this field could anticipate would be very trifling. I think there is no question about it.

I will be done if the witness answers this one question.

JUDGE BARNES: We will permit the one question.

MR. THURMAN: Your Honor, Mr. Topkis evidently is trying to swing this testimony but, as far as it goes, building the plant is not part of the complaint. It is outside the scope of the direct.

He is talking about BOC was the most likely entrant into the production and distribution of gases, industrial gases.

JUDGE BARNES: This is rate of return of a plant owned by Linde where they are supplying a captive account, so to speak. It is rate of return within one per cent of the capital increase. In other words, your rate of return would be one per cent on increase.

MR. TOPKIS: One per cent over the cost of the capital.

as I understand it.

JUDGE BARNES: Can you answer that yes or no?

MR. DOAN: Your Honor, this morning when we were dealing with questions of rate of return. This was the kind of information we indicated we were still objecting to for the several reasons on the appeal. Certainly if this kind of information is ever ruled by the Commission as required in this case, this is definitely information we want to have handled on an in camera basis.

MR. THURMAN: BOC, Your Honor, has built plants in this country. They know what rate of return is. Let him get it through his own witness. This was not part of the direct examination.

JUDGE BARNES: Now he wants to know what Linde's rate of return is.

MR. THURMAN: It still is outside the scope of the direct.

JUDGE BARNES: Perhaps this is an area you should go into in your case in chief, Mr. Topkis. If Mr. Thurman is goin to stay away from rates of return in his case in chief, I am going to foreclose that avenue to you on cross-examination.

MR. TOPKIS: I think this is important, Hour Honor. This witness testifies that he harbored some degree of expectation that BOC might enter the American market. I can't imagine how I can cross-examine him except by asking him could they expect to make money or lose money if they did so. I am doing so in the most circumspect fashion. Indeed, I will now, if I may, withdraw that question and put it to the witness in very precise terms, which will demonstrate that I am not intruding upon anybody's privacy. I will ask the witness this question:

Mr. Flamm, in your office, meeting with me and Mr. Kaplan and Mr. Doan and Mr. Sierck, two or three weeks ago, did you not tell us that price competition is so vigorous in the business of supplying on-site plants, or in supplying the gases that come from on-site plants, that typically the reate of return is driven down to the level of one or two percent above the cost of the capital?

MR. THURMAN: Objection, Your Honor. This is outside the scope of the direct. If he wants to build his case on this he has his defense coming up. Whether he perceived them on potential entrant, the gentleman has already stated on the stand it does not make any difference what the ragt of return for building the plant is. Under the Falstaff case, if he perceived them as a potential entrant, that is it.

JUDGE BARNES: I would not say that is it. That may be it as far as you are concerned. I am going to sustain Mr. Thurman's objection on the basis that he did not go into rates of return in his case in chief. Now, this may necessitate recalling people or getting stipulations. But I think I will sutain the objection on the basis he did not go into rates of return.

MR. TOPKIS: Very well, Your Honor.

MR. DOAN: If I may interject at this point, I am aware that we have touched on several questions which have bordered on the area of confidentiality leading to the possibility of perhaps having to recall Mr. Flamm later under other circumstances. To the extent possible we woudd like to be able to cover Mr. Flamm's testimony today. Without in any way suggesting to counsel how they have to handle their case at this time on this particular question, Mr. Flamm indicates that he is willing to waive any claim of confidentiality in the interest of moving on. I make this not for the purpose of getting you to change your ruling, but just so that both counsel understands we will be waiving confidentiality with respect to that question.

JUDGE BARNES: Do you still have an objection, Mr. Thuraan?

MR. THURMAN: Yes, Your Honor. It is outside the scope. If Mr. Flamm wants to go into this area and counsel has no objection to confidentiality we will go back on direct and go back to rate of return on all industrial gases, has it increased or decreased since 1970. This will open up a whole new avenue. I was only protecting them. I withdrew the question to start with.

JUDGE BARNES: I will sustain the objection. We will move on to some other area.

MR. TOPKIS: Your Honor, just to make the record clear, the question I withdrew a moment ago, may I regard it as being contained within the area you are forbidding me to inquire into?

THE WITNESS: That is right, sir, rate of return.

By Mr. Flamm:

Q Now, Mr. Flamm, I think before in asking you about industries that have their own air separation units, industries having companies within them that have their own separation units, I asked you about steel and petroleum, and I would ask you also about glass.

Do some glass companies to your knowledge have their own air separation units?

A I don't know of any but I would not be at all surprised if some might have their own little nitrogen plants.

Q Mr. Flamm, in the last six or eight years has Union Carbide acquired any distributors, that is to say, bought them, purchased them, made downstream acquisitions?

A Yes.

Q Has that been a matter of company practice or policy, or has it been the rare exception?

A It has been the rare exception.

Q The company's policy generally has been to stay out of distribution.

A Well, that is a different question. Your question was, Is the company policy to buy these distributors?

Over the course of the last six or eight years that has been a very, very minor activity. Now, when you say do we stay out of distribution, we are very much involved in distribution.

Q Doing it yourselves?

A Yes.

Q You are?

A Yes.

Q Where do you distribute?

A All overthe United States.

Q Having your own distribution operations?

A Yes.

Q In competition with distributors to which you sell?

A In some cases, in many cases.

Q Mr. Flamm, do I understand that at one point Standard Oil of New Jersey or Exxon Corporation, as it is now called, owned American Cryogenics?

A That is correct.

Q American Cryogenics was in the air separation business?

A That is correct.

Q There came a time when they sold that company?

A To Liquid Air.

Q Do you happen to remember when Standard Oil of New Jersey bought American Cryogenics?

A   When they bought them?

Q   Yes.

A   Within plus or minus two years, I would say 1960, 1958.

Q   And sold around 1967?

A   Y es, five or six or seven years later.

Q   I am told that in France the Shell Petroleum Company was engaged in the air separation business through a company called Prodair. Are you familiar with that?

A   Yes.

Q   Is Shell still engaged in that business?

A   It falls in the same category as hearsay. It is something that I read in the paper. I think you are going to have someone from Air Products testifying here. I think he is far more authoritative than I.

Q   I will ask them about it. Fine, sir.

Now let me ask you about this business. Does anybody import oxygen into the United States?

A   Does anybody import oxygen into the United States?

Q   Yes.

A   The answer to that is yes.

Q   In any significant quantity?

A   Only insofar as things come across the northern and southern borders.

Q   But the distribution cost of oxygen is such that nobody ships it across the ocean?

A That is correct.

Q Is the same true of nitrogen?

A Yes, sir.

Q Carbon dioxide?

A Yes.

Q Carbon monoxide?

A I would say probably yes.

Q Helium, on the other hand, is shipped across the ocean?

A That is correct.

Q I suppose it is a high cost product.

A That is not really the reason it is shipped. The reason it is shipped is because it is not available elsewhere. As soon as the becomes available elsewhere it will not be shipped.

Q Actually there has been some international development in the helium field in recent years, has there not?

A Yes.

Q There has been helium discovered in Algeria?

A Algeria, Poland, USSR.

Q Formerly the United States had, forgive the expression, a monopoly on the supply?

A In the western world that was true.

Q Now, typically, is there a radius around an air separation plant where it is economical to distribute the gases produced by that air separation plant?

A Yes.

Q How large is that radius typically? We realize there will be variation.

A Let me emphasize there clearly will be variations.

Q Please.

A That which is true in a distribution location like northe New Jersey where no one can drive, anybody knows, ten miles without taking up a lot of time, is vastly different than in some Texas location. So when I give you a general answer, like most general answers it will have significant exceptions. I would say that more than 100 and less than 200 mile radius with the two hundred being an upper economical limit is typical

Q Now, just so that we may complete this picture of how distribution of atmospheric gases is conducted, at that air separation tower that you were describing to us before, [illegible] gases are generated in what form?

A Which market are you describing now, the merchant market or on-site market?

Q Let us take them separately. Let's take first the on-site market. You have an air separation plant which is next to the steel mill. How do you deliver the oxygen to the steel mill?

A The products come off the air separation tower as a gas and get compressed by either an oxygen or nitrogen compressor, and thence into a pipeline to the customer.

Q Still in gaseous form?

A That is correct.

Q That is called on-site selling?

A That is correct.

Q Now you mentioned the term "merchant distribution". What is that?

A Merchant or distributable, that is a product that for all practical purposes is not on site. It can take a myriad of forms. It can leave the air separation plant and get compressed into a cylinder and then the cylinder is shipped to the end customer.

Q The end customer being the distributor?

A Either the distributor or end customer, different people reach that end marketplace a lot differently. If the customer is ten minutes from our plant he would most likely be a direct customer. If it is a distributor who redistributes it would be a distributor.

Oxygen or nitrogen would be sold to the customer in liquid form?

Q First you have to compress it more until it reaches the liquid form?

A That is in the tower. That plant that produces gas usually has the capability of producing liquid. In other words, the gas has been in liquid form before it became gas.

Q If you want to you can keep it in the liquid form and shi it out in cylinders?

A No.

Q Those large tank trucks we see on the highways?

A Yes. Those are not cylinders. That is liquid delivery. That would be going through a rrailer to usually a customer where the product is then stored as liquid. In many cases subsequently converted back to gas or in the case of light food freezing nitrogen is used as liquid to recover the refrigeration from the product.

Q So these trailer trucks carrying liquid will go to an end use customer who will then either use the liquid as liquid or regasify it in order to use it as gas?

A That is correct.

Q Those trucks may also deliver liquid to a distributor, is that correct?

A That is correct.

Q The distrigutor then in turn would either regasify it or sell it in liquid form?

A That is correct.

JUDGE BARNES: I haven't heard chlorine mentioned here.

THE WITNESS: No. It is not an industrial gas. You don't have that listed as an industrial gas, do you?

MR. THURMAN: No.

THE WITNESS: If you pick up our specialty gas catalog the odds are that chlorine is in there. Basially what the specialty gas business is is a packaging and distribution function where we have the expertise of handling these cylinder In terms of physical volume and dollars for the industrial gas company it is a very, very minor item. There are people in the chlorine business where it is a big item, but it is not the industrial gas people.

MR. TOPKIS: Your Honor, I think I am nearly done. Would it be well to take a brief recess?

JUDGE BARNES: Yes. Let's take a ten-minute recess.

(Brief recess)

JUDGE BARNES: On the record.

By Mr. Topkis:

Q Mr. Flamm, going back to something for just a second, do I understand that argon is shipped beyond that 100 to 200-mile radius that you mentioned?

A Yes.

Q Shipped nationwide, or at least far more widely --

A Far more widely. The economics permit it to be shipped more widely. The answer to the one to two hundred was oxygen and nitrogen.

Q Typically, Mr. Flamm, is there a very significant differen in magnitude between the price you charge to a steel company tc which you are supplying hundreds of tons of oxygen a day from a on-site plant, and the price you charge to a distriutor to whom you may be selling a few thousand cubic feet per day?

A Is there a difference in the price?

Q Yes.

A Yes.

Q Is one a great multiple of the other? Is there any secrecy about this kind of figure?

A No. I will give you orders of magnitude as far as one relationship to the other.

Q Fine.

A It is probably less than one order of magnitude. Less than a factor of ten difference.

Q About a factor of ten?

A Between five and ten. Something like ten.

Q Fine.

Now, you mentioned a company this morning called Big Three being one of the leading gas producers in the country.

A One of the top eight, I think. Yes.

Q That company does not sell throughout the United States, does it?

A No, it does not.

Q It sells in the Gulf area only?

A No.

Q Where, then, sir?

A Gulf, East Coast and West Coast. The Gulf Coast, the southern California and Florida and peripherally around those areas.

Q Now, I asked you before about the 2,000 ton per day plant that you have announced. Am I right in believing also that you have either a thousand or commenced construction of a new air separation plant in East Chicago, Illinois, and Garland, Texas?

MR. THURMAN: Objection, Your Honor. It is outside the scope of the direct and not relevant.

MR. TOPKIS: He is asking how many plants they have. I am seeking to establish they are building two or three more.

JUDGE BARNES: I will permit the answer.

THE WITNESS: It is public knowledge. The answer is "yes".

By Mr. Topkis:

Q Do you have any plans to build in the Four Corners area, the area where the State of Utah, New Mexico, Arizona and Colorado come together?

A Not knowing if I answer this question, does that now start indicating I must give some future marketing plans?

JUDGE BARNES: I am going to rule that the question is not relevant as to what the future plans are. We will stay out of that area.

MR. TOPKIS: Very well, Your Honor.

ByMr. Topkis:

Q You said that atmospheric gases have been in short supply in one pocket or another of the country for a year or year and a half. Do you recall that testimony of this morning?

A Yes, I do.

Q Before then for a good number of years there has been an excess of supply, is that right?

A There has been an excess of supply in certain geographical areas, primarily those areas that had been dedicated to the aerospace program. As the aerospace program contracted, those areas, and I think we know them all, California, Florida, the Huntsville, Alabama type, those pockets had some significant surplus.

Q As a matter of fact, during the late 60's wasn't there a significant surplus pretty generally through the New England area, through the Chicago, Detroit, Pittsburgh areas?

A The problem when you ask these general questions is there was a significant surplus in the aerospace-oriented areas but we have just brought a plant on stream, about a 250-ton per day plant, in Connecticut to serve the New England market.

For us to make that decision we had to make that decision somewhat better than two years ago. So the answer to that question then is that we did not feel there was a surplus in New England two to two and a half years ago.

Q Would it be accurate to say, then, that it has been your experience in this industry that wherever a shortage develops the companies operating in the field are sufficiently forward-minded that they will plan to supply capacity to that area of shortage?

A To the extent that the companies predict accurately what the growth will be, which many of us did not do very well in the last two years, as U.S. industry in general did not, the answer to your question in general is yes.

MR. TOPKIS: Your Honor, at this point I would like to apply for production of what at the criminal bar we call Jencks Act material of this witness. By that I mean, of course, statements prepared or approved by the witness as substantially accurate verbatim transcriptions of those statements.

JUDGE BARNES: Mr. Thurman, do you have any substantially verbatim written statements by the witness?

MR. THURMAN: No, Your Honor.

MR. TOPKIS: I understand there was submitted by Complaint Counsel to this witness a proposed affidavit for his signature which he rejected. His counsel, I have been informed, prepared another form of that affidavit. I would imagine and suggest that the first affidavit which Complaint Counsel submitted to the witness they believed to be a substantially verbatim transcript of remarks he had made. As a consequence, I would like to see that draft.

JUDGE BARNES: Well, the draft, as I understand it, was not signed by the witness, therefore he did not adopt it and it would not be permissible for cross-examination purposes. On the other hand, if he has submitted one to Complaint Counsel that should be produced.

Do you have any such statement?

MR. THURMAN: That is before my time. I will let Mr. Youngwood respond to this.

MR. YOUNGWOOD: Your Honor, the affidavit to which you refer, the affidavit which was submitted by Mr. Flamm, is presently in the hands of Messrs. Topkis & Wade. I am sure if they will search the file they will be able to find it.

MR. TOPKIS: We have that one. I know about that. That was the motion paper in Delaware. I am referring to any affidavit other than submitted by Mr. Flamm or the counsel.

THE WITNESS: That is the only one I submitted.

MR. TOPKIS: Let me press my point, Your Honor, if I may, that under the authorities relating to the Jencks Act area we are entitled to what Complaint Counsel believed to be the substance, the accurate substance of Mr. Flamm's remarks which they submitted to him in the form of a proposed affidavit.

JUDGE BARNES: No. I am not going to order that produced if the witness specifically rejected it. I don't thin it would be fair to him to have him questioned on Complaint Counsel's interpretation that he specifically rejected.

MR. TOPKIS: Then, Your Honor, it would seem to me that what he rejected is testimony by him as to facts which are not true.

JUDGE BARNES: I think that is taking Jencks a little too far. It is further than I want to take it at the time.

MR. TOPKIS: I will defer to Your Honor's ruling, of course.

Now I would like to ask for production of whatever notes Complaint Counsel took during their interview with Mr. Flamm before the drafting of the affidavit.

MR. THURMAN: Your Honor, I have no verbatim notes. I have notes I took in interviewing him but they are not producible under Jencks.

MR. TOPKIS: I think Your Honor at that point is required to take a look at them.

JUDGE BARNES I think I should take a look at whatever notes you have, Mr. Thurman.

MR. THURMAN: I assume we are entitled to the same thing --

JUDGE BARNES: You will be entitled to identical tr treatment.

MR. THURMAN: --of all their witnesses plus Airco respondent witnesses.

MR. TOPKIS: I don't acquiesce in that for a second.

JUDGE BARNES: We are not talking about today's testimony, Mr. Thurman.

MR. THURMAN: No, sir. I have my notes somewhere here if I can find them. I must say this is the first time I have had to produce my notes.

JUDGE BARNES: Well, you are producing them to me.

MR. THURMAN: I don't know whether you can read them or not.

JUDGE BARNES: Let the record show that I have examined the notes -- Do you have more?

MR. THURMAN: These are Mr. Purcell's notes.

JUDGE BARNES: Mr. Purcell, are the typewritten notes your refinement of the yellow pages.

MR. PURCELL: Excuse me, Your Honor. I had my secretary type my notes.

JUDGE BARNES: Your notes are the yellow pages?

MR. PURCELL: That is correct.

The typed version should be verbatim of the yellow notes. They are one and the same.

JUDGE BARNES: I have examined the notes which have been handed to me. There are two sets of note, one by Mr. Thurman and two by Mr. Purcell. The examination indicates that they are not substantially verbatim statements of the witness. At the interview which Mr. Purcell was recording there were several people who were speaking. They are very cryptic, not complete sentences, one and two words, things of that nature. Therefore, it is my ruling that these are not within the Jencks requirement. I am not going to require them to be produced.

By Mr. Topkis:

Q Mr. Flamm, were you interviewed by Mr. Youngwood?

A On this case?

I guess the answer is yes.

MR. TOPKIS: May I inquire through Your Honor whether Complaint Counsel have any interviews of Mr. Youngwood?

MR. YONGWOOD: Mr. Purcell and I interviewed Mr. Flamm. I believe Mr. Krulia was with us. I did not bring notes with me. I believe Mr. Purcell's notes also related to that meeting. However, I can say my notes were in no way verbatim.

MR. TOPKIS: Of course I am not going to challenge Mr. Youngwood. I am prepared to accept his statements.

By Mr. Topkis:

Q Mr. Flamm, are you familiar with a publication called the Wall Street Transcript?

A Yes.

Q According to an article appearing in the April 16, 1973 issue of that publication, on or about March 15, 1973, Union Carbide's vice president and chief financial officer, W. E. Pardoe, appeared before the New York Society of Security Analysts. To your knowledge, at that time was Mr. Pardoe a Union Carbide vice president and chief financial officer?

A Yes.

Q And the article of which I have a copy reports him as stating that recent price iccreases in merchant gases has been offset by increased power and distribution costs. Do you recall his stating that?

MR. THURMAN: Objection, Your Honor. In the first place, he is reading statements not in evidence. I move that that be stricken. Secondly, it is not made by this witness. It is hearsay.. It must be elicited from the person making the statement.

JUDGE BARNES: I will overrule your objection.

Do you recall the statement being made, Mr. Flamm?

THE WITNESS: I recall reading the article. I didn't hear the statement made. I was not at the Security Analyets' meeting.

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By Mr. Topkis:

Q Did this statement accord with your understanding of the fact?

A Yes, it does.

Q Now, would you agree -- let me ask you first, what is the term "tonnage oxygen"? What does that mean?

A Tonnage oxygen is usually referred to as the product that comes from what we have been describing as on-site plants.

Q That is to say, oxygen produced in such quantity that you measure it by the ton rather than by the cubic feet?

A That is correct. Not only produced but sold in such tonnage. In other words, a plant might produce 200 tons of liquid and get sold to a myriad of customers. At that point we don't consider that tonnage oxygen. However, if that is a captive 200 ton a day plant selling it as 200 tons a day, we call that tonnage.

Q It is the production of an on-site plant delivered to one or perhaps one or two customers?

A Basically that is correct.

Q Now, is it very necessary, in your experience, to have that tonnage oxygen to the steel industry to supply the base from which you can grow to other products which are more profitable?

A Is it necessary? No.

Q Do you know a Mr. F. Perry Wilson?

A Do I know him?

Q Yes.

A Yes.

Q Who is he, sir?

A He is Chairman of the Board of Union Carbide.

Q Did you ever hear Mr. Wilson say, "It is very necessary to have that tonnage oxygen to the steel industry to supply the base from which we can grow to these other products which are more profitable"?

A I don't remember his saying that, but I can believe it was said.

Q Has he expressed these views on other occasions within our hearing?

A No. That was not within my hearing either.

Q Did you read that statement attributed to Mr. Wilson in the Wall Street transcript?

MR. THURMAN: Objection, Your Honor. I don't believe this is proper cross-examination.

JUDGE BARNES: I think it is irrelevant whether or not he read it.

MR. TOPKIS: Okay, Your Honor.

By Mr. Topkis.

Q Now, you spoke this morning on direct examination by Mr. Thurman of some projections you made as to air separation products for five years. So you remember that?

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A Yes, I do.

Q You testified that those projections related only to merchant production; is that right?

A Specific numbers I was giving related to merchant.

Q You were quoting from some written projections, were you not, or where you just making them up as you sat there on the witness stand?

A No. That is what our five-year plan is based on.

Q Some written projections?

A Well, we don't break down each and every product by a detailed projection by marketplace and so on and so forth. In attempting to develop information for our management as to what our capital needs might be, we must base these on some generalized projections since it costs approximately the same to product so many millions of cubic feet or tons per day of product.

Therefore, the generalized porjections help us in getting generalized capital requirements. That was the basis for those types of numbers.

Q Those numbers appeared on a piece of paper somewhere?

A I suspect they do, by our planning department somewhere. That is not what I was quoting from. I was quoting from memory.

Q You were quoting from memory something you had read?

A Or discussed.

Q You are not sure which?

A I know I read it. I know I read it. In fact, I was reading it on the plane down here. One of the documents I was reading was Air Products projections for these projects to some security analysts. I was mumbling to myself, yes, that is what we think it is going to grow at also. Eight percent was in that document.

Q Did you read anything other than information helpfully supplied to you by Air Products? Did you read any of your own internal information on the plane coming down?

A I read my notes to myself of this eight percent projection.

Q That you made on some occasion when you discussed ---

A That is what our five-year plan is based on.

Q And these figures that you give us, seven and nine percent compounded for the next five years in the merchant field, those were your projections of industrial demand in th[illegible]erchant field; is that right?

A Do you mean physical volume?

Q Yes.

A Yes.

Q That is what you expected the market would require?

A That is correct.

Q Now, you weren't referring to any tonnage projections?

A Not with that eight percent number.

Q What portion of industrial sales is represented by tonnage in oxygen and merchant sales of oxygen in volume?

A In volume?

Q Yes, or dollars.

A I have been talking dollars all along.

Q Fine.

A I can give you a more intelligent answer in dollars than I can in volume.

Q Okay.

A I am now at the point where I have to define market.

Q No, you don't have to define market at all. I am the last person in the world to ask you to do that.

A How can I give you a dollar amount if I can't define what dollar amount that relates to?

Q I am asking you, sir, to tell us, please, what the normal relationship between tonnage sales and merchant sales has been in the recent past.

A You are asking for Linde numbers of industrial numbers.

Q I will take tiehr one. Let us start with Linde.

A Linde numbers of tonnage versus merchants for oxygen, nitrogen and argon.

Q All right.

A I would say about one part tonnage to one-and-a-quarter parts merchant.

Q That is in dollars?

A Yes.

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Q So, in volume the tonnage would be perhaps six or seven times the merchant?

A Let me say that I trust the Bureau of Census data on production and that is broken down by those categories. That is more reliable than mine.

Q How about Linde? Does your experience conform to that of the Department of Commerce?

A We are one of the sources of their information.

Q You are not atypical?

A We are by and large not atypical.

Q You mentioned as companies having the technology and the finances to begin producing industrial gases in the American market a number and then you said, as I recall it, that the Japanese have the resources but have not shown any interest.

A I said to date.

Q Do you think it a very real possibility that the Japanese will show some interest in the near term?

A Shear speculation. I haven't any idea.

Q Has it come to your attention recently that the Japanese have entered other American fields? For example, aluminum and television.

MR. THURMAN: Objection, Your Honor.

JUDGE BARNES: I think it is going a little far afield. They recently bought Motorola or some television company.

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ms-7

MR. TOPKIS: I have heard a bit about that in antitrust law.

By Mr. Topkis:

Q To your understanding, has the Japanese firm Hitachi been offering to sell air separation plants in the United States?

A I think I have seen one bid by Hitachi.

Q Mr. Flamm, I am almost done but let me ask you this: You testified this morning that you thought it possible that BOC might enter the American separation field. Do you recall that testimony?

A Air separation gases?

Q Yes.

A Yes.

Q Let me ask you this: Are you telling us that you believe that to be a possibility for some years now?

A I have only been in my industrial gas business area for five years. I would say that has been in our house the subject of some discussion for half that time.

Q The last couple of years?

A Last couple or three years as a possibility, particularly as it got precipitated by Air Liquide coming, can BOC be far behind, that type of discussion.

Q Did you make any memo about that possibility?

A No.

Q Never put it down on paper?

A No.

Q You were for the last couple of years making constant decisions relating to price increases or decreases in industrial gases; is that right?

A Yes.

Q Have you ever made any such decision in whole or in part because of the possibility that BOC might or might not enter the United States air separation field?

A You flatter me on my sophistication as to how that decision would enter my pricing decisions which are one year or one-half year type decisions. No, it was a degree of sophistication that did not enter our considerations.

Q You never thought about it in considering prices; is that right?

A That is right.

Q Now, decisions were also made by you and your company in this time relating to the construction of new production capacity; is that right?

A Yes, sir.

Q In making any such decision, was your judgment in the slightest degree affected by the possibility that BOC might enter the American air separation field?

A No, sir.

Q In your dealings with distributors for the last couple of years has your conduct in the slightest been affected by the possibility that BOC might enter the air separation field in the United States?

A No, sir.

MR. TOPKIS: There is one thing, and I will say that although I would love to spare Mr. Flamm the necessity for another appearance here, if matters before the Commission go as we hope with reference to Union Carbide's documents it may be that we will have to extend him an invitation to come back. I would like to reserve that opportunity.

MR. DOAN: Without interrupting, I would at this point like to put before the Court a request that perhaps any recall of Mr. Flamm might be arranged in New York at the time that there will be proceedings conducted up there.

MR. TOPKIS: We would be delighted to cooperate with that.

JUDGE BARNES: It may be that his testimony will be limited in which event you could work out a stipualtion.

MR. TOPKIS: I would hope so.

I think that does it it, Your Honor.

Thank you very much, Mr. Flamm.

JUDGE BARNES: Mr. Wade, do you have any questions?

MR. WADE: Your Honor, I do not want to go back over any of the areas covered by Mr. Topkis, but will skip those at this time. I just have one or two questions for you, Mr. Flamm.

ms-10 By Mr. Wade:

Q You mentioned, I believe, on cross-examination that Big Three produced atmospheric gases in certain parts of the country but not in others.

A That is correct.

Q The Pacific Northwest, is there a company that produces atmospheric gases rather solely in that area of the country?

A Well, the company you are probably referring to, the two main producers there are Airco and IAP, which is now part of Liquide Air which does produce; IAP does not but Liquide Air, their parent, produces in many parts of the country.

Q Air Products does produce, Industrial Air Products, on the West Coast?

A That is correct.

Q I know that you have said that your knowledge of CO_2 is somewhat limited but taking that into consideration is the production of CO_2 a regional specialty such as the production of air separation gases is?

A As I understand it, CO_2 is just about as distribution intensive as the air gases. Now, I can't give as precise an answer as I quantified to Mr. Topkis but I would have to say it is regionalized for that reason.

Q So, in that sense it is differentiated from other types of gases which are used in industry which are distributed on a nationwide basis?

A It is distinguished from those that are, yes.

Q Now, in telling Mr. Thurman about some of the users of your company's products which might be denominated industrial gases, you mentioned the food industry; is that correct?

A Yes.

Q What gases would be used by the food industry?

A I would say the two principal ones would be nitrogen and hydrogen.

Q Do they use large quantities of oxygen?

A Oxygen?

Q Yes.

A Not really.

Q But the steel industry does use large quantities of oxygen; is that right?

A Yes, they do.

Q The chemical industry would use a fair amount of helium, would it not?

A Helium -- more oxygen than helium.

Q It certainly uses oxygen; that is correct?

A Yes.

Q But it also does use a fair amount of helium?

A I guess it uses helium. If you were to ask me to list the industries that use helium, chemicals would not be one that comes to the top of the list.

Q The steel industry does not use very much helium, however;

isn't that correct?

A The steel industry does not use very much helium except so far as the steel industry is integrated down to the fabricating level as some of them are and helium could very well be used in the fabricating end of the steel industry.

Q In concession to the shortness, can we characterize this by saying some of those industries you listed as customers for your company's products will use certain gases and other industries might use other gases, some might use them all and some might use only a few?

A Absolutely.

Q You mentioned a mong your listing of indsutrial gases a generic term for a group of gases called fuel gases; is that correct?

A Yes.

Q You were asked to name three of those or some of those. You named MAPP, propane and propylene.

A Yes.

Q I would like to limit myself to MAPP, propylene and propane which are the three first mentioned when Mr. Thurman first asked you that question.

Now, those three are not formed from acetylene, are they?

A No, they are not.

Q Carbon dioxide?

A No, they are not.

Q Carbon monozide?

A No.

Q Argon?

A No.

Q In fact, how are they formed?

A Mostof them are by-products from other petrochemical processes.

Q They are not included in rare gases, are they? And you would not include them as coming from argon, helium, hydrogen, nitrogen and other separation gases?

A That is correct.

Q You term those fuel gases as industrial gases?

A We term virtually anything we sell in the gas area as industrial gas. Therefore, any product that those products compete with, I am not talking about all of the marketplaces that propane competes, but to the extent that it competes as a fuel gas we consider all of these things as part of that environment out there.

We are competing against it, therefore, it must be industrial gas. If it is not an industrial gas, acetylene must not be.

Q Then I take it you are telling me that an industrial gas is gas which is sold to industry for use in an industry?

A Obviously I would be in trouble because Judge Barnes might ask what about chlorine. So there is some limitations

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on the parameters we are describing here.

For our very parochial interest we described industrial gas as those gases that we competed in my department.

Q But another company might have a different set of gases called industrial gases which they might use in their own in-house nomenclature?

A That is correct.

Q Just to get one thing straight in some colloquy that occurred earlier this afternoon when Mr. Topkis was asking you about the hypothetical Linde plant that might be constructed, the Airco-BOC constructed, and BOC may have constructed certain air separation units in the United States but they have never produced gas, retained ownership of those units and produced gas for themselves to sell or use, have they, to your knowledge?

A Is that a question?

Q That is a question.

A It is my knowledge they have not. They have merely sold the hardware.

Q When you were discussing with Mr. Topkis the question of oxygen and air being used in the steel industry, if I had a basic oxygen furnace, which is a type of steel producing facility, I wouldn't use air, is that correct, I would use oxygen?

A That is correct. The oxygen I was referring, I was

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referring to the oxygen process, once you make a conscious decision, all oxygen is a form of air enrichment. It displaces the air. Once you design it for oxygen you can't very well use it for the same capacity for air.

Q A basic oxygen furnace is a large installation with a good capital outlay; is that right?

A The answer to your question is that, yes, it would not be converted back to air.

MR. WADE: Thank you very much.

No further questions.

JUDGE BARNES: For the record, when were these plants built by Airco? During what years?

THE WITNESS: I think they went onstream in 1972. So they were probably constructed in '70-'72 era, the ones for U.S. Steel. The one for Big Three I think was constructed sometime before that.

JUDGE BARNES: Airco-BOC had been engaged for sometime in constructing a plant?

THE WITNESS: This U.S. Steel venture took place, I believe, right at the end of that relationship. In fact, I think the relationship had terminated by the time the plant went onstream.

MR. WADE: There will be some evidence coming in on the joint venture for construction of U.S. Steel plant.

JUDGE BARNES: Mr. Thurman, do you have any redirect?

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MR. THURMAN: Yes.

JUDGE BARNES: I want to ask you are the distributors that we have been referring to usually exclusive distributors for one industrial gas company or do they handle lines of different companies?

THE WITNESS: They are a real mixed bag. As it pertains to the gases they usually are the sole, they are usually supplied by a single producer. Now, to the extent that one of the producers may not have one of these fuel gases that we spoke of and hence some of their market would require those, they are perfectly free to go out and get gas from some place else.

Now, that only represents part of his activity. Another significant part of his activity is the welding supply, the welding torches, the electrical power supplies. That he gets from numerous suppliers. It would be a most unusual situation if you would just see one line of equipment with a given distributor.

JUDGE BARNES: They do tend to stick to one industrial gas supplier?

THE WITNESS: Yes; that is correct.

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REDIRECT EXAMINATION

By Mr. Thurman:

Q Are most Linde distributors exclusive distributors?

A The answer is yes and no. On gases that a given supplier can supply they are usually exclusive. But they are free to go out -- let us use the example we have used. If a Linde distributor finds that it is beneficial for him in his marketplace to have MAPP gas, he is free and does go to somebody, Airco to be specific, to get that gas to complete his line.

In the welding equipment area he is definitely not exclusive. He goes out to the welding supply manufacturers that can best supply because they have physical characteristics as contrasted with what Mr. Topkis says, oxygen is oxygen is oxygen.

Q We were talking about gas, not welding equipment.

A I thought you were talking about distributors. You have my answer on gas.

Q What percentage do they buy in the solid form? Do they store in liquid form?

A Both. Some distributors store in liquid form and either sell as liquid or compress as gas. Some distributors are not in the liquid part of the business at all and merely get gas from their supplier.

Q Any idea what percentage sells in liquid?

A I haven't the slightest idea.

Q You mentioned the steel companies and chemical companies and Ford Motor Company had backward integrated into producing gases. Do these companies sell these gases in the open market?

A No, they do not. The question I was asked was do they have the capital and expertise to own and operate the plants? My answer to that was, yes, to my knowledge they do not sell and market in this area.

Q Do you consider them in the industrial gas business?

A No, I do not. The industrial gas business -- you said what characterizes it earlier this morning. Marketing is an extremely important area.

Q Does the Linde Company have market expertise to enter the distrubution of industrial gas?

MR. TOPKIS: I don't think there has been a foundation laid for the witness' familiarity with U.S. Steel or Ford.

MR. THURMAN: Mr. Topkis has been talking all afternoon about U.S. Steel and Ford and the chemical company.

JUDGE BARNES: I will let you answer that, Mr. Flamm.

THE WITNESS: First, do I consider them in the industrial gas business? The answer is no, I do not. Do I believe they today have the technical expertise to participate effectively in this marketplace? The answer to that is I do not.

By Mr. Thurman:

Q I believe that they have backward integrated to some extent, but haven't you testified that they also purchase for their own consumption?

A They do both. In Chicago we have some them plants. In Chicago we supply on-site to them.

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Q They purchase from the industrial gas people, producers?

A Speaking of gas?

Q Yes.

MR. TOPKIS: I lost that question.

JUDGE BARNES: May we have the question read back?

(The pending question was read by the reporter.)

THE WITNESS: The answer is yes.

By Mr. Thurman:

Q What percentage of industrial gas shipments are accounted for by acetylene:

MR. TOPKIS: Is this dollars or volume?

MR. THURMAN: In dollars.

JUDGE BARNES: Is this Linde or is this industry?

By Mr. Thurman:

Q Do you know it industry-wide?

A No, I don't.

Q Do you know Linde?

A Yes. I can approximate Linde and I can approximate industry. Both are approximates with the industry being more poorly founded.

MR. TOPKIS: strike the "less well founded" at the very least.

JUDGE BARNES: Let us stick with Linde, percentage.

MR. WADE? Also, we are not sure what the denominator of that fraction might be.

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THE WITNESS: That is the problem I have been trying to address myself to. When somebody says what percent of some market and we haven't defined what the market is yet, if you would like what percentage of the $195 million that we talked about this morning it is more like 10 percent than any other number.

MR. TOPKIS: That is damning with the faintest praise I have heard in quite some time.

JUDGE BARNES: Is that your best estimate?

THE WITNESS: Yes, it is more like 10 than 15 or five. I can't tell you whether it is 10 or 11. It is more like 10. That is my memory.

By Mr. Thurman:

Q I believe you testified on cross that the prices have been on the upswing, the price increases, like 15 percent.. How long have the prices been on the upswing?

A I testified in specific answer to a specific question was their artical in the Wall Street Journal a couple days ago about Linde coming out with a 10 or 15 percent price increase and answer to that was yes.

Q Have prices been on the upswring in the recent years?

JUDGE BARNES: When was your last price increase prior to this one?

THE WITNESS: Thirteen months prior.

JUDGE BARNES: And prior to that?

THE WITNESS: About a year prior.

By Mr. Thurman:

Q Is the expertise in handling one type of industrial gas, is this similar to all industrial gases?

A Not all but many.

MR. TOPKIS: What does handling mean, Your Honor?

JUDGE BARNES: Let us say marketing.

THE WITNESS: I don't think I have given an answer.

JUDGE BARNES: Let us go back to the other question. You have not answered the other question.

By Mr. Thurman:

Q Which one?

A Is it applicable to all? I would say that we consider acetylene very darn unique for safety reasons. So, the care in manufacturing acetylene is not the same as an inert gas like nitrogen.

In the technology as far as handling cryogenic fluids across the board there is a great deal of commonality.

Q Are there any outside products -- Mr. Topkis compared the usage of oxygen with other industrial gases. Are there any products outside the industrial gas field that are interchangeable with oxygen or nitrogen or argon?

A In almost all of these areas you would be able to argue, as I did, that air is interchangeable for some applications with oxygen. I think Mr. Topkis was correct that for the

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largest segment of the various marketplaces that these products are used they are usually used for their unique characteristics. Hence, oxygen is used for supporting combustion. That is its most unique characteristic.

Q I believe you testified on cross that you did not consider BOC when you considered your pricing, made your decisions or policies on pricing. Did you consider anybody?

A Yes.

Q As being a potential entrant into the market?

A No, I considered my existing competitors.

Q Did you consider anybody outside the market when you were making your construction plans or policies?

A No. Again I keep saying no. You mean outside of someone today participating in the U.S. market?

Q Right.

A The answer is no. I sure as hell do consider those participating in the market today.

Q Did you consider anyone outside the United States industrial gases not selling industrial gases in the United States in making your distribution policy?

A No.

MR. THURMAN: We have no further questions, Your Honor.

MR. TOPKIS: Just a couple on recross, if I may, Your Honor.

RECROSS-EXAMINATION

By Mr. Topkis:

Q You were asked a few minutes ago by Mr. Thurman as to your views as to whether the United States steel corporation had the marketing skills necessary to enter the industrial gases business. You said that you doubt it.

A That is correct.

Q Would it be your expectation that if United States Steel tried to hire itself a few good marketers it might find some?

A I would think that they would be able to find some few good marketers.

Q As a matter of fact, with specific reference to a marketer named Alec Flamm, if U.S. Steel were to offer you a five-year contract with $25,000 a year raise over your present salary -- I am not asking whether you would go, I am asking whether you would be tempted.

A For the record let me say I gave an emphatic no.

MR. TOPKIS: May the record record waves of laughter.

JUDGE BARNES: I don't think we should involve Mr. Flamm personally in this matter. I believe you answered the question that they could find people

THE WITNESS: Since the question is can they buy marketing skills, not trying to make this an overly complicated industry there is a lot more to marketing in this industry than having three or four key people. You stay way back at

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the technology end and you come way into the marketplace.

So, there is a myriad of functions between the technology and the time you convince the marketplace that you are a technologically sound supplier of these products. With just those three people, if Flemm had to go there he would have to build up a hell of an organization.

By Mr. Topkis:

Q No doubt about it. Certainly U.S. Steel has the technological skills to produce all the air separation gases that it wants to.

A I would say that they could. They have the Skills today in Chicago, in several other places to produce the products.

Q One of the plants you built for them is one of the largest in the country, isn't it?

A No.

Q Isn't there a thousand ton a day plant you built for them?

A No, two 500rds. Maybe that is where you get the thousand.

Q At Chicago?

A Two fives.

Q Twin fives?

A Correct.

Q Let me ask you, how many people does it take to operate a 500 ton a day plant?

A Obviously it varies with the degree of automation one puts on the plant but I would say three or four a shift.

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Q Mr. Flamm, would it be correct to say that the prices of on-site gas have been declining in recent years because the size of individual costomers has been growing?

MR. THURMAN: Objection, Your Honor. He can answer for Linde whether it has been declining. It is too general a question. I object to the form of the question.

JUDGE BARNES: Will you restate the question?

By Mr. Topkis:

Q I will take it for Linde. It has been your experience, has it not, that on-site prices, the prices you have been able to get for on-site supplies have been declining because the size of individual customers has been growing?

JUDGE BARNES: That is a double parallel.

THE WITNESS: For a given size customer I would say with the increased cost of in energy and the increased cost of construction the prices have probably reflected that increase over the last three to five years.

Now, if your question is can you buy a thousand tons of oxygen out of a thousand-ton-per-day plant and get some economic benefit compared to buying a hundred tons of oxygen out of a hundred-ton-per-day plant, the answer is that there is some economic benefit.

By Mr. Topkis:

Q And the customers with which you deal have a skill for extracting that economic benefit?

A Well, the outside world takes care of that.

MR. TOPKIS: No further questions.

Thank you.

MR. THURMAN: I have one more question, Your Honor, on re-redirect.

JUDGE BARNES: Re-redirect.

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FURTHER REDIRECT EXAMINATION

By Mr. Thurman:

Q To you knowledge, have any of the steel companies, gas companies or Ford Motor company indicated any interest in entering the marketing of industrial gases?

A Yes.

Q Who was this?

A U.S. Steel.

Q What happened?

A You are into the hearsay, but I believe they went to something like A. D. Little and had a big study made and made the decision based on that that they weren't about to.

MR. THURMAN: That is all.

JUDGE BARNES: I was going to ask you, Mr. Flamm, do you have any steel companies that have been marketing industrial gases to outside parties?

THE WITNESS: I believe there are some of the companies Mr. Topkis mentioned that are a captive that on occasion due to the nature of their own operations have some excess product and I believe they have wholesaled that product on occasion to somebody in the industrial gas business, not as a general policy, but I have some available because things are going to well, would you like to pick some up, and I think that has been their total involvement.

JUDGE BARNES: When they wholesale it, do they wholesale it to companies like you?

THE WITNESS: Not us but companies like us, yes, because they don't have the cryogenic downstream marketing wherewithal.

JUDGE BARNES: How about the chemical companies?

THE WITNESS: Some of those, let us say, ammonia producers, have wholesaled argon. Argon can be a by-product from ammonia waste gas. Some people have chosen to invest and have created that type of wholesale facility.

JUDGE BARNES: Whom do they sell to?

THE WITNESS: Any and all customers, I think. Most of the people who are newcomers are people in the industrial gas business.

JUDGE BARNES: You mentioned Cities Services as being ---

THE WITNESS: That is helium.

JUDGE BARNES: Exxon did own a company in the industrial gas business but they sold it?

THE WITNESS: That is right, to what has now become Liquide Air.

JUDGE BARNES: Any other petroleum companies that market industrial gases?

THE WITNESS: Again, just helium to my knowledge where some of the petroleum companies are involved in the natural gas end of things and the source of helium is primarily natural gas.

I think on the West Coast an oil companies provides the raw material for Allied Rogen plant, but that is sort of an intermediate level. That is not the end marketplace.

JUDGE BARNES: Any other questions prompted by my examination?

MR. DOAN. One comment I did want to make before the close of today's proceedings just to clarify any misunderstanding that might have arisen on previous colloquy on the subject of confidentiality.

I want to make it clear that in the interest of expediting matters at that point we were agreeable to proceeding with an answer to a very specific and limited question on the subject of rate of return.

We still have very strong objections to the rate of return as it was being dealt with earlier in this proceeding.

JUDGE BARNES: Thank you, Mr. Doan.

MR. TOPKIS: If Your Honor please, I realize belatedly that thereare a number of our exhibits which I think ms-29 Mr. Flamm can authenticate. Specifically I refer to BOCRX-101 to 111 which are Union Carbide annual reports for the years 1961 to 1971.

JUDGE BARNES: I don't think we will have any trouble with annual reports authentication.

MR. TOPKIS: The same thing is true with extraction from Moodies relating to his company.

MR. DOAN: I hope we don't have to authenticate what Moodies publishes, do we?

MR. TOPKIS: I will try Mr. Flamm rather than counsel. If counsel has directed letters of protest to Moodies I will welcome them. It seems to me these are the standard financial world statistics.

JUDGE BARNES: Moodies would have to authenticate a Moodies report or I will take judicial notice it is from Moodies. How far beyond that do you want to go?

MR. TOPKIS: Nowhere. That will be quite satisfactory. Just one other thing.

FURTHER RECROSS-EXAMINATION

XXXXXXX By Mr. Topkis:

Q Mr. Flamm, the production of ammonia results in carbon dioxide as a by-product; is that right?

A My understanding is that in certain ammonia processes carbon dioxide can occasionally be a by-product, yes.

Q To your knowledge, do any of the ammonia producing companies sell off the carbon dioxide?

A Take my word for it my knowledge of CO_2 is very minimal.

Q I should not have transgressed. You told us that earlier. Let me ask you about a couple other gases.

So far as marketing is concerned, in marketing chlorine and ammonia and sulfur dioxide do you have distribution problems, handling problems rather akin to those you encounter in dealing with atmospheric gases?

MR. THURMAN: Objection, Your Honor, it is outside of the question, Your Honor, was asking the witness.

JUDGE BARNES: I overrule the objection.

You brought up the question of handling.

MR. THURMAN: I did not ask those questions. I was asking industrial gases.

JUDGE BARNES: He is comparing these with industrial gases.

THE WITNESS: There are characteristics that are different and thereare characteristics that are the same. The ones you mentioned I think would require considerable more care fromthe safety standpoint than some of the routine nitrogen-argon types of gases.

MR. TOPKIS: Okay, fine.

I have no further questions.

JUDGE BARNES: Are there any further questions?

MR. THURMAN: No further questions.

JUDGE BARNES: Thank you very much.

D we have a witness for tomorrow?

MR. THURMAN: Yes, Your Honor.

JUDGE BARNES: One witness?

MR. THURMAN: Yes.

JUDGE BARNES: Will he be comparable to the length of time taken for Mr. Flamm?

MR. THURMAN: Yes.

JUDGE BARNES: Where is he from?

MR. YOUNGWOOD: Air Products and Chemicals.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 4:35 p.m. the hearing was recessed, to be reconvened at 9:30 a.m., Tuesday, May 7, 1974.)

C O N T E N T S

WITNESSES

FOR THE COMMISSION:	DIRECT	CROSS	REDIRECT	RECROSS
Dexter Farrington Baker	362			
(Voir Dire)pp. 380		423		

EXHIBITS

COMMISSION:	IDENTIFIED	RECEIVED
304A, B and C	380	380(initially)
304A, B and C(rejected page 383.)		
1A thru W; 2A thru D; 3A thru S; 4A thru D; 5A thru S; 6A thru Z; 8A thru Z; 9A thru Z; 10A thru Z-12; 11A thru Z-10; 12A thru Z-80	472	472
14 thru 19, 21, 22, 23, 25, 26, 27, and 29	473	473
31, 32, 33A, 34, 35, 36, 37, 38, 40, 41, 42 and 43	474	474
44 thru 51	475	475
52A thru Y	476	476
53	----	477
55(withdrawn)pp. 482		
56	----	482 (as limited)
57-59 and 61-64	----	484
66A-C	----	484
67A-Z1	----	488

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EXHIBITS (continued)

COMMISSION:	IDENTIFIED	RECEIVED
68, 69 and 70	----	488
72	----	493
73A-J and 74A-D	----	496
75	----	497
77A and B(IN CAMERA)	----	501
78 A thru D(IN CAMERA)	---	501
76A-N	----	501
79A-C and 80A-C	----	502
81A-Z	----	505

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BEFORE THE

FEDERAL TRADE COMMISSION

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IN THE MATTER

of

BRITISH OXYGEN COMPANY, LTD.,
BOC FINANCIAL CORPORATION,
BOC HOLDINGS, LTD.,
BRITISH OXYGEN INVESTMENTS, LTD.,
AIRCO, INC.

Docket No. 8955

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Room 7314, The Star Building,
414 Eleventh Street, N.W.,
Washington, D. C.,
Tuesday, May 7, 1974.

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

ERNEST G. BARNES, Presiding Administrative Law Judge.

APPEARANCES:

K KEITH THURMAN, GORDON YOUNGWOOD, DON PURCELL, DARYL NICKEL, RHETT KRULIA and JOHN HOAGLAND, on behalf of the Federal Trade Commission.

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison, 345 Park Avenue, New York, New York 10022, on behalf of Respondent, British Oxygen Company, Ltd.

GEORGE J. WADE, R. BRUCE MacWHORTER and DANFORTH NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York 10005, on behalf of respondent AIRCO, INC.

APPEARANCES (continued):

ROBERT N. SAYLER and HENRY SAYLER, Covington & Burling, 888 16th Street, N.W., Washington, D.C., on behalf of Respondent Air Products & Chemicals, Inc.

JACK HEALY, Counsel, on behalf of Respondent, Air Products, R. D. #2, Allentown, Pennsylvania.

PROCEEDINGS

JUDGE BARNES: On the record.

MR. YOUNGWOOD: Complaint counsel calls Dexter Baker to the stand.

Mr. Baker is represented by counsel. They may wish to make an appearance at this time.

MR. SAYLER: Robert Sayler and Henry Sayler of Covington and Burling, and Mr. Jack Healy, in-house counsel for Mayer Products.

DEXTER FARRINGTON BAKER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

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DIRECT EXAMINATION

By Mr. Youngwood:

Q Please state your name and address for the record.

A Dexter Farrington Baker. I have a post office address of R.D. 2, Allentown, Pennsylvania.

Q Are you presently employed?

A Yes, I am.

Q Please state your present position.

A I am Executive Vice President and Director of Air Products & Chemicals of Allentown, Pennsylvania.

Q How long have you held that position?

A My exact position I have held, I guess, since 1969.

Q What are your present duties in that position?

A I am responsible for the gasses and equipment group activities within Air Products & Chemicals. I am also a member of the Executive Committee of the company and its Board of Directors.

Q Are you responsible for both domestic and foreign operations?

A In the industrial gas and cryogenic equipment fields, yes.

Q What position did you hold prior to your present position?

A I was managing director of Air Products, Ltd. and chief executive officer of our European operations in the industrial gas field.

Q How long did you hold that position?

A From 1957 to 1967.

Q Did you hold other positions with Air Products prior to that time?

A Yes, prior to that time I was sales manager of the Cryogenic Equipment Division of the parent company in the United States. Prior to that I was a sales engineer in cryogenic equipment sales.

Q How long have you been employed by Air Products?

A 22 years.

Q Will you tell us please what products Air Products manufactures and sells?

A We sell a complete line of industrial gasses. We produce a wide range of chemical products. We produce medical gasses and medical equipment, welding equipment and supplies. We have a large engineering and construction group concerned with the construction of chemical and petroleum and chemical processing plants.

Q What group is responsible for the sale of industrial gasses?

A Our gasses and equipment group.

Q You have referred to the term "industrial gasses." Will you explain to us please what its meaning is to you?

A "Industrial gasses are primarily atmospheric-produced gasses plus such principal gasses as hydrogen, helium, acetylene, carbon dioxide, atmospheric gasses being oxygen, nitrogen, argon, the rare gasses -- krypton, xenon."

Q Are all of those gasses produced by you?

A We produce all but helium. Helium we purchase from others.

Q Are all of those gasses marked by you?

A Yes.

Q In the United States?

A Yes.

Q Would you by virtue of your experience and dealings in the industrial gas industry be aware of the names of other companies producing and marketing the gasses which you have just received?

A In the United States?

Q Yes, sir.

A Yes.

Q Would you name those companies please?

A The Linde Division of Union Carbide Corporation, the Air Reduction Company, Liquid Carbonic, National Cylinder Gas, Big Three, Liquid Air. There are smaller companies such as Burdett, Alabama Oxygen, National Welders. These are the ones that come to mind quickly.

Q Mr. Baker, you indicated that industrial gas is produced by Burdett. Can you tell us a more definitive name for the corporation?

A Burdett Oxygen Company, I believe it is.

Q Do you know where that company might be located?

A Actually there are two Burdetts. One is located in Cleveland and there is a second company located in Norristown, Pennsylvania. They both trade under similar names.

Q Is industrial gas marketed and produced by Selox?

A Yes, that is another company.

Q Is it produced and marked by Pacific Oxygen Company?

A Yes, that is another regional company.

Q Is it produced and marketed by Southern Cryogenics?

A Southern Cryogenics is principally concerned with carbon dioxide, but it is one of the industrial gasses.

Q Is it produced and marketed by Whitmore?

A That name is not familiar to me.

Q Is it produced and marketed by Northern Gasses and Supply Company?

A Yes.

Q Are industrial gasses also produced and marketed by Gardner Cryogenics?

A Gardner markets helium, yes.

Q Would you by virtue of your experience and dealings in the industrial gas industry know the names of your major competitors and the extent to which they sold in the United States market?

MR. TOPKIS: Major competitors in what, Your Honor?

MR. THURMAN: In the production and marketing of industrial gas.

THE WITNESS: I have no knowledge of individual competitors' sales other than what might have been released through these proceedings.

By Mr. Youngwood:

Q Would you know the names of your major competitors in the marketing and production of industrial gas?

A In the United States?

Q Yes, sir.

A The Linde Division, Union Carbide, Air Reduction Company, National Cylinder Gas Division of Chemetron, Liquid Carbonic, and I would say Big Three Industries. They would be the principal competitors. I am sorry, there is also Liquid Air.

Q Is Burdett Oxygen of Cleveland considered by you to be a major competitor?

A Not a major competitor. They are a regional producer.

Q Do any of these companies produce oxygen and not nitrogen?

A Not to my knowledge, no.

Q Do any of them market oxygen and not nitrogen?

A No, not to my knowledge.

Q Do any of these companies produce oxygen and not argon?

A No.

Q Do any of them market oxygen and not argon?

A No.

Q Do any of these companies produce nitrogen and not argon?

A No.

Q Do any of them market nitrogen and not argon?

A No.

Q Do any of these companies produce nitrogen and not oxygen?

A No.

Q Do any of these companies market nitrogen and not oxygen?

A No.

Q By virtue of your experience and dealings in the industrial gas industry, are you aware of the manner in which the gasses just specified above, namely, oxygen, nitrogen and argon, are produced?

A Yes.

Q Would you describe for us the manner in which they are produced?

A They are produced by the ---

MR. TOPKIS: Isn't this a little cumulative? I thought this was gone through with the witness yesterday.

JUDGE BARNES: I don't think it is.

MR. YOUNGWOOD: If Mr. Topkis would like to avoid from this moment on a discussion of the manner in which all industrial gasses are produced, we will be happy to agree to that type of an approach.

JUDGE BARNES: We can't adjourn the hearing to agree this morning. We will continue the examination until such time as you bring in a stipulation.

By Mr. Youngwood:

Q Would you tell us the manner in which these gasses are produced?

A Those three gasses are produced principally by the liquefaction of atmospheric air. Air is liquified and then distilled by distillation techniques and the three gasses are separated into their individual constituents of atmospheric air. Then they are then purified and stored as liquid gasses and transported normally to their end use as a liquid gas.

Q Can you tell us please an approximate percentage of sales of industrial gasses that oxygen, nitrogen and argon represented for your products for Air Products & Chemicals?

MR. TOPKIS: What year is this question addressed to?

MR. YOUNGWOOD: 1972, 1973.

THE WITNESS: I would say approximately 85 percent of our total industrial gas production consists of oxygen, nitrogen and argon.

MR. TOPKIS: Can we know if that is in dollars or volume, Your Honor?

JUDGE BARNES: Yes.

THE WITNESS: That was volume.

By Mr. Youngwood:

Q What percentage would you estimate that it might constitute in terms of dollars of overall sales?

A There might be a shift downward in the order, say, of 5 to 10 percentage points. It might be between 75 and 80 percent on a dollar basis. There are other gasses that sell at a somewhat higher price, which would tend to weigh down that actual percentage in total dollars. These are figures that I have not studied myself. They are my best recollection, so they are not precise information. I just have not made that computation.

Q Would you by reason of your experience and dealings in the industry be aware of approximately what percentage they might represent throughout the industry?

MR. TOPKIS: I object. There is better information than this witness' guesses.

JUDGE BARNES: He has given his sales figure.

MR. YOUNGWOOD: I have asked him if he would be aware of what the figures would be in the industry. Should he not be permitted to tell us whether he would be aware of that by virtue of his experience?

JUDGE BARNES: Ask him if he is aware.

By Mr. Youngwood:

Q Are you aware?

A Yes.

JUDGE BARNES: On what basis?

THE WITNESS: Literature, industry surveys that have been published.

JUDGE BARNES: You answered earlier that you did not know about the sales of your competitors.

THE WITNESS: I don't know them precisely. You are talking about an industry now.

JUDGE BARNES: You may ask your question, Mr. Youngwood.

By Mr. Youngwood:

Q Can you tell us please what percentage of the dollar sales of industrial gasses in the United States we can say for the year 1972 and 1973 might be constituted by oxygen, nitrogen and argon in the industry as a whole?

MR. TOPKIS: Objection.

JUDGE BARNES: Overruled. You may answer.

THE WITNESS: My belief is it is around 80 percent.

By Mr. Youngwood:

Q Mr. Baker, you have given us a list of gasses which are marketed by you. You have indicated that these are gasses which you consider to be industrial gasses. To what extent are these gasses marketed by you substitutable for products other than those we are discussing today?

MR. TOPKIS: I beg your pardon. I can't imagine a less incomprehensible question.

JUDGE BARNES: Can you reframe your question?

MR. YOUNGWOOD: I can rephrase it.

JUDGE BARNES: Are their products substitutable for industrial gasses? Is that your question? To what extent are other products substitutable?

By Mr. Youngwood:

Q Yes, to what extent are nonindustrial gasses substitutable for industrial gasses?

A I don't know quite how to answer the question. Industrial gasses have individually unique properties -- oxygen causes combustion operations to speed up. Nitrogen is an inerting gas which tends to slow down an operation or prevent a production from occurring. Hydrogen has a reducing effect on individual operations. It removes oxygen or inhibits oxidation from occurring.

These products are used in their principal applications because they are the best products to be used for those applications. There are some types of applications such as hydrogen which can be used in a pure state or you can take ammonia and break it into its constituents and in some limited applications substitute ammonia for hydrogen or nitrogen as the case may be.

In the main the reason these individual gasses are purchased is because they are the preferred product for the particular application in which they are used. So, I can't say that it comes to mind that gasses are being in competition with other products because if they are procured for a particular use, it is because they are a preferred use in that application.

JUDGE BARNES: Mr. Baker, you mentioned medical gasses in sort of a separate category. Is that the way you understand medical gasses to be?

THE WITNESS: They are separate because of the rather specialized marketing associated with them. Oxygen produced from an air separation plant is used in the medical market just as it is used in the industrial market. Of course, its application in medical are entirely different. They are designed for respiratory care or therapy rather than for combustion-type operations.

The anesthetic gasses, of course, have rather specialized uses and are found to be used largely in medical applications, although there are some minor industrial or commercial applications for, say, nitrous oxide as a pressurizing gas and certain aerosol-type containers.

By Mr. Youngwood:

Q Mr. Baker, does Air Products & Chemicals produce a full line of gasses?

A Yes, we think so. When you say "produce," again I make the distinction that we procure our helium from basic producing plants owned by others, but we then market helium through the United States and overseas.

Q I can then understand, I think, that Air Products & Chemicals does market a full line of gasses.

MR. TOPKIS: Of industrial gasses?

MR. YOUNGWOOD: Yes, in the United States.

THE WITNESS: Yes, that is correct.

By Mr. Youngwood:

Q Earlier in your testimony you listed several companies that you found from your experience in the industrials marketed industrial gasses in the United States. Do each of those companies market a full line of industrial gasses?

A I listed a large number of companies. It could very well be that some of the smaller companies' lines of products are smaller than our own. Our principal competitors market essentially the same products we market.

Q Will you explain for us please the reason, as you understand it, that a full line of industrial gasses is marketed by what you have designated as your principal competitors and yourself?

MR. TOPKIS: Objection insofar as it relates to the principal competitors. I suppose the witness can state why his company does it, but it would be mindreading to state what others do.

JUDGE BARNES: I will sustain the objection.

By Mr. Youngwood:

Q Would you tell us please why Air Products & Chemicals markets a full line of gasses?

A I think it is necessary for us in supplying many of our principal customers to offer a full line of gasses because our customers in the main prefer to buy a full line of their gas requirements at individual locations from a single supplier. For us to be competitive and responsive to the marketplace and to the actions of our competitors, we must seek to satisfy the market as our customers shape that market. That is their desire to purchase their total gas requirements from a single supplier at a particular location.

Q What was the United States' net selling value of industrial gasses shipped by Air Products for the year 1972?

MR. TOPKIS: Objection.

JUDGE BARNES: What is your objection?

MR. TOPKIS: First, I think the question is unclear and, second, if it be clear, I think the witness' recollection is not the best evidenc e of the figure that is sought. I would have no objection to the figure.

JUDGE BARNES: Do you understand the question, Mr. Baker?

THE WITNESS: I believe so. I believe he is seeking the value of our shipments of industrial gasses for a specified period of time. I am quite happy to answer that question.

JUDGE BARNES: Go ahead.

THE WITNESS: If you would state a particular year ---

By Mr. Youngwood:

Q For the year 1972.

A I believe our shipments at actual invoice value was approximately $108 million.

Q Can you tell us please what figure was reported by Air Products & Chemicals to the Bureau of Census for the year 1972?

MR. TOPKIS: Objection, Your Honor, on the best evidence ground.

JUDGE BARNES: I will overrule the objection. You may answer if you know.

THE WITNESS: I am sure we did submit information. That information was prepared by our staff and I just don't happen to know what that actual figure was. I can only defer to whatever our staff reports might have indicated in that regard.

By Mr. Youngwood:

Q Mr. Baker, have you seen an affidavit submitted to the Federal Trade Commission over the signature of Daniel L. McGinnis?

A Yes, I have.

MR. YOUNGWOOD: Your Honor, I would like to show the affidavit to Mr. Baker to refresh his recollection of the materials contained in it at the time he did see it so that he might be better able to answer my question as to the figure which was submitted to Census.

JUDGE BARNES: Was this affidavit prepared by Mr. Baker?

MR. YOUNGWOOD: No, sir, the affidavit was prepared by Daniel L. McGinnis, controller of the Industrial Gas Division. However, Mr. Baker has testified he has seen the affidavit and was aware of the figures which are contained therein.

JUDGE BARNES: It seems to me the document would be the best evidence here, Mr. Youngwood. You are just having Mr. Baker read off a figure from a document prepared by some other party.

MR. YOUNGWOOD: Your Honor, we would like to offer into evidence in camera, if desired, Exhibit No. 304-A, B and C.

MR. TOPKIS: I don't think we have seen 304-A, B and C. I have not seen it.

MR. YOUNGWOOD: We had provided counsel with a copy. We had not identified it prior to this time. We did not believe it would be necessary to enter the document into evidence.

MR. TOPKIS: What is it?

MR. YOUNGWOOD: It is the affidavit of Daniel L. McGinnis.

MR. TOPKIS: That we have and I object to it.

JUDGE BARNES: What is the basis of your objection?

MR. TOPKIS: I have no idea who Mr. McGinnis is.

MR. WADE: I object also because I have no way of finding out what Mr. McGinnis used to put the numbers on the third page of that.

MR. YOUNGWOOD: May I offer it into evidence?

JUDGE BARNES: You may offer, but you have an objection.

MR. YOUNGWOOD: May we have a one-minute recess please?

XXX (A brief recess was taken.)

MR. YOUNGWOOD: I would like to offer this to Mr. Baker for purposes of identification.

JUDGE BARNES: I don't think this is proper to have Mr. Baker identify a document prepared by some other party. He may recognize the signature, but he knows nothing about the accuracy of the report. He did not prepare it. I think it is improper.

By Mr. Youngwood:

Q Was the document prepared under your supervision, sir?

A I honestly can't say that I directed its preparation, no. It was prepared by people in our organization in response to a request for that information, but I did not direct its preparation. It was prepared by the people who have that information in hand.

Q Mr. Baker, the Federal Trade Commission sought information pursuant to a subpoena which was issued by His Honor directed to you in which we requested certain information relating to value of shipments?

A Yes, sir.

Q Did you receive the subpoena?

A Yes, I did.

Q What steps did you take at that point in time to determine that we might receive the information requested?

MR. WADE: Does the "you" refer to Mr. Baker or to Air Products in general?

JUDGE BARNES: I think you are referring to Mr. Baker, is that correct?

MR. YOUNGWOOD: That is correct.

THE WITNESS: I directed appropriate staff organizations within our company prepare the necessary information and submit it to the Federal Trade Commission.

By Mr. Youngwood:

Q Was the affidavit of Daniel L. McGinnis then prepared as a result of your direction that the figures be compiled?

A Yes.

Q Mr. Baker, can you tell us if this is the affidavit?

JUDGE BARNES: Don't say "this." Identify it.

MR. YOUNGWOOD: 304-A, B and C is the affidavit of Daniel L. McGinnis?

THE WITNESS: Yes, it is.

MR. YOUNGWOOD: I would like to offer it into evidence.

MR. WADE: Objection. I have no way of cross-examining any witness produced by the Commission on the subject of that affidavit. Therefore, if the affidavit is being offered for any truth of anything that is in it, the right to cross-examination has just gone. It is hearsay as far as Mr. Baker is concerned.

The proper way to get that in is to call Mr. McGinnis to the stand. If Mr. Youngwood doesn't want to do that, then he can't get the affidavit in. I object.

JUDGE BARNES: Mr. Baker, had you seen this affidavit before this morning in this courtroom?

THE WITNESS: Yes, I have.

JUDGE BARNES: have you had occasion to check the accuracy?

THE WITNESS: I have not personally checked them, but I have great confidence in the people who prepared them.

JUDGE BARNES: What is Mr. McGinnis' title with the company?

THE WITNESS: He is the controller of the Industrial Gas Division and as such chief accounting officer of our Industrial Gas Division.

JUDGE BARNES: Did he prepare this affidavit at your direction?

THE WITNESS: Yes, he did.

JUDGE BARNES: Do you have any reason to doubt its accuracy?

THE WITNESS: No, sir.

JUDGE BARNES: I will receive Commission Exhibit 304-A, B and C.

XXX (The document referred to was marked Commission's Exhibit 304-A, B and C for identification, and was received in evidence.)

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By Mr. Wade:

Q Did you see any of the papers Mr. McGinnis used in preparing this affidavit?

A No, I did not.

Q Were you with Mr. McGinnis at any time when he was looking at the figures from which he derived this affidavit?

A No, I was not.

Q Did Mr. McGinnis tell you personally what figures he looked at in order to derive the information in this affidavit?

A He told me what information he drew the information from.

Q But you have never seen those figures on any piece of paper other than this affidavit in connection with the preparation of that affidavit?

A The information comes from our internal accounting reports and I regularly see that information.

Q Did you see it in connection with the preparation of this affidavit? I understand that you have people ---

A I see it regularly, so I see our annual sales.

Q I did not ask that. I asked in connection with the preparation of this affidavit.

A I would have to say, yes, that I did see the base information from which this was drawn, yes.

Q In connection with the preparation of this affidavit. I know that you see your monthly reports on a montly basis and probably on a daily basis, but that is not what I asked.

A I am not sure I understand what you are asking. Did I simultaneously examine our monthly reports and examine this document concurrently? Is that the essence of your question?

Q Yes.

A I would have to say I did not.

Q Where is Mr. McGinnis?

A In Allentown, Pennsylvania.

Q Where are the documents he would use to derive this information?

A In Allentown, Pennsylvania.

MR. TOPKIS: Your Honor, can I add to our objections the fact that while perhaps under the most extraordinary circumstances there might be reason to deprive a party of its right to cross-examine, those circumstances certainly have not been developed here. Wishing Mr. McGinnis all the accuracy and highest of heart, I don't see why we should be stuck with the possibility that he made a mistake.

MR. YOUNGWOOD: Your Honor, we have called a goodly number of witnesses we intend to examine, but there are still any number of other witnesses we have not called. We hope to be able to work something out whereby we could save Mr. Topkis, his client, and everybody else a great deal of time. There is no reason either Mr. Topkis or Mr. Wade have to doubt the varacity of the figures.

MR. TOPKIS: We have not seen the documents. On the day we can see the documents, we can compare.

MR. WADE: We had a witness yesterday who told us at least half a dozen times you can't trust Census figures because everybody does it different. We will get an excellent example of garbage in and garbage out.

JUDGE BARNES: I don't think this is garbage and we wanted an expedited trial. If you are going to object to that to examine these figures, I will request that you call Mr. McGinnis.

MR. WADE: Frankly between all of us I think we should have Mr. Youngwood show us the documents. They may be perfectly O.K. They may contain oddities of Air Products.

JUDGE BARNES: I had hoped you could get together to stipulate these figures.

MR. TOPKIS: They have not shown us the Census reports. I said to Your Honor four weeks ago we can't buy a pig in a poke and that attitude continues.

JUDGE BARNES: I am going to reject Commission 304-A at this time and request you call Mr. McGinnis.

XXX (Commission Exhibit 304-A, B and C, previously received in evidence, was rejected.)

MR. THURMAN: They know this question is going to be asked and there is no way to stipulate unless they look at these books off the record. Mr. Topkis talks out of both sides of his mouth. He wants to expedite the trial and get it over with and, on the other side, he delays and does not look at records. He was late on every subpoena. He has delayed this trial completely.

JUDGE BARNES: I have rejected the exhibit and I ask that you call Mr. McGinnis.

MR. YOUNGWOOD: I would like to make one more comment. I think it is entirely probable we are going to have to call a great number of witnesses from Great Britain to verify some of the statements they have made to us in their submissions to us.

MR. TOPKIS: I don't know what that means.

MR. YOUNGWOOD: I am not certain we can accept the numbers they have given with us, and bring all these documents with them. May we place this in the rejected file please?

JUDGE BARNES: You can offer it again at any later date through a witness.

By Mr. Youngwood:

Q Mr. Baker, is there any type of expertise which is required in the production, marketing and handling of industrial gasses?

A Yes, it is a very specialized business.

Q Will you describe for us please the type of expertise as you understand it which is required?

A First, one has to have a good understanding of chemical engineering principles in the design, construction and operation of cryogenic facilities for the separation of atmospheric gasses. These plants operate at extremely low temperatures and misoperation can be quite hazardous to the people concerned and to the surrounding community.

The products are distributed at the temperatures at approximately -300 degrees and must be produced and distributed in especially constructed vessels and equipment designed to withstand those extreme temperatures. The products are then shipped over the highways in conformance with rather strict Federal regulations and are delivered to especially designed containers on customer sites where the product is stored and released on demand to meet individual customer needs.

All of this equipment is very specialized and is used almost exclusively only within the industrial gas industry again because of the rather special low temperatures in which these products are produced and distributed.

In the marketing of the gas products, and in-depth understanding on how the products are produced, purified and the ability to maintain the integrity of the product is important and also the physical and chemical properties must be well understood so these products can be offered to individual customers

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to meet rather specialized individual needs of those different customers.

The industrial gas products are used in a wide range of industries and each industry has many different applications. So, an understanding of the unique applications of individual customers within individual industries is paramount to success and achievement in the industrial gas industry.

Q You have described the type and degree of technical expertise which exists in the industrial gas industry. In your business judgment does British Oxygen Company possess the expertise you just described?

A Yes.

Q Can you tell us what is required to enter the industrial gas market in the United States on a broad spectrum please?

MR. TOPKIS: Objection to the use of "market."

JUDGE BARNES: We will use the word "market" not in the antitrust sense.

THE WITNESS: One would have to construct an economic size facility capable of producing certainly the atmospheric gasses which are the principal products of the industrial gas industry.

Then one would have to equip himself with specialists who understood the operation of such facilities, the distribution of the products required or produced, rather, and then marketing specialists who would understand how those products would be used in the various industries and customers to which you offer them for sale.

By Mr. Youngwood:

Q Do you have reason to be knowledgeable with respect to the marketing expertise of British Oxygen Company?

A Yes.

Q Will you describe for us please the extent of your knowledge and reason?

A We competed with the British Oxygen Company and still do today in Great Britain and in several other national markets. We find them to be a very competent and capable producer and marketer of industrial gasses. They are by far the dominant producer in most of the markets in which they operate where we also are in those same markets.

Q In your business judgment in 1973 what companies had the capital, technical and marketing expertise, incentives and interest to enter on a broad spectrum the U. S. field for the production and marketing of industrial gasses?

MR. TOPKIS: Your Honor, in the interest of a clear record, could we have those many questions taken one at a time. I recognize the language. It has a familiar ring to it, but I think we would get along better.

JUDGE BARNES: Let's take it one step at a time.

By Mr. Youngwood:

Q In your business judgment in 1973 what companies had the requisite capital for the -- what companies had the requisite capital to enter the U. S. market for the production and marketing of industrial gas?

A The only requirement being capital here?

Q Yes.

A I think many, many companies throughout the world have the capital resources of entering the industrial gas market in the United States. I can think of several hundred that would have sufficient capital.

Do you want me to name 100 companies?

Q I have no reason to ask you to name them now.

What companies possess the technical and marketing expertise to enter the United States market in 1973 for the production and marketing of industrial gasses?

MR. TOPKIS: Could we take it one at a time?

JUDGE BARNES: I am not so sure about the first question, which was very unfruitful. We will have to ask the combined question what companies had all.

THE WITNESS: It cannot have just one ingredient for success.

JUDGE BARNES: I guess for capital, Chase Manhattan to enter the market. Go back to your combined question.

By Mr. Youngwood:

Q In your business judgment in 1973 what companies had the capital, technical and marketing expertise, incentives and interest to enter on a broad spectrum the United States field or market for the production of marketing of industrial gasses?

MR. TOPKIS: Objection.

MR. WADE: Objection.

MR. TOPKIS: I object to the terms "interest, incentive, broad spectrum." That is all I remember, but I think there were a couple of others.

MR. YOUNGWOOD: I am not sure I understand the basis for the objection.

JUDGE BARNES: Broad spectrum does not mean much to me.

MR. YOUNGWOOD: Is he suggesting the witness cannot understand my question?

JUDGE BARNES: I know "broad spectrum" in antibiotics. I don't know "broad spectrum" in a full line or broad line of industrial gasses.

MR. YOUNGWOOD: I will be happy to substitute "broad line" for "broad spectrum."

MR. TOPKIS: How can this witness know what incentives any one of the hundreds of companies he mentioned might have or what interests they might have? Perhaps communicated to him -- but that would be hearsay.

MR. YOUNGWOOD: I asked in his business judgment what he perceives. I did not ask what he knows. I asked what is his state of mind.

JUDGE BARNES: Let's have the question read back.

(The reporter read the question.)

JUDGE BARNES: Let's eliminate "incentive and interest" and get the technological know-how.

MR. YOUNGWOOD: Your Honor, I would like to ask, if I can, what companies Mr. Baker perceived had these particular qualifications. I think he can perceive that particular companies might have had incentives and interest to enter. It might have been his opinion that they had incentives by virtue of the vast amount of experience he has had throughout the world and certainly in the United States industrial gas field.

MR. WADE: I don't know exactly what he means by "incentive," whether he means objective or subjective one, but I can think of all sorts of circumstances of a company that might have an interest they would keep to themselves. Mr. Baker would probably need some psychic abilities to try to ferret it out.

MR. YOUNGWOOD: I don't have any objection if Mr. Wade cross-examines Mr. Baker on his answer, but I don't really understand why it is necessary for him to put his way of thinking, his definition, into Mr. Baker's mind.

JUDGE BARNES: Let's leave "incentive and interest" out of your question. Limit your question to capital and technological know-how to manufacture and distribute the gas and then ask him a second question, who does he perceive as lacking interest?

By Mr. Youngwood:

Q In your business judgment in 1973 what companies did you perceive to have the capital and technical and marketing expertise to enter on a broad line the United States field or market for the production and marketing of industrial gasses?

A Besides British Oxygen Company?

Q Yes, sir.

JUDGE BARNES: He said "any company" now.

THE WITNESS: I can think of only two other firms who would have the capital and technical and marketing competence to enter this market at this time. That would be the Messer Greisheim A.G., part of Chemische Werke Hoechst, A.G. in Germany, and the Linde A.G., who were the previous owners of the Linde Division of Union Carbide.

JUDGE BARNES: When he asked you the question, he did not say "other companies," he meant total companies.

THE WITNESS: And the British Oxygen Company would be the third.

By Mr. Youngwood:

Q Which of the companies mentioned would be the best qualified in your business judgment as my question pertains to capital and technical and marketing expertise, most qualified to enter the United States industrial gas market?

A I would say the British Oxygen Company.

Q What incentives would you say might exist for a company to to enter the industrial gas market in the United States in 1973?

MR. TOPKIS: Objection. It calls for the mind of someone who is not here. This witness could only know what was reported to him.

MR. YOUNGWOOD: I will rephrase the question.

By Mr. Youngwood:

Q As you perceive the industrial gas market in 1973, what incentives would you say might exist for companies presently outside the market to enter the United States industrial gas market?

MR. WADE: I am not objecting. I take it this calls for some hypothetical conclusion of "might exist" or "might happen" or whatever.

MR. YOUNGWOOD: I am just asking him what his state of mind is.

JUDGE BARNES: Strike the word "might" from the question and ask what conditions existed in 1973.

THE WITNESS: Do you want me to describe the U. S. market conditions? The U. S. market is a very large industrial gas market. It is probably the largest single industrial gas market in the world today. The market is growing very rapidly. There is a limitation on production capacity existing in the United States market today. There are many new applications for industrial gasses which are developing within the United States which makes the U. S. market a very dynamic growth market for the industrial gas industry.

By Mr. Youngwood:

Q Did you in 1973 envision that any companies not presently in the United States industrial gas market would have the incentives and interest to enter that market?

MR. TOPKIS: Objection.

JUDGE BARNES: I will overrule the objection, but I think this is a question that has already been asked.

MR. YOUNGWOOD: I did pose my question with respect to the capital and technical and marketing expertise. I believe you asked me then to limit a particular question to that sphere and then go on to ask another question as it might relate to incentives and interest. So I would then ask Mr. Baker whether he envisioned in 1973 that my company might have the incentives and interest -- if any companies had the incentives and interests to enter the United States industrial market.

MR. WADE: Could we have the question back please?

(The reporter read the question.)

JUDGE BARNES: I will permit you to answer that question.

THE WITNESS: We have within our own council speculated from time to time as to the possibility of some of these other firms entering the market, and we have anticipated that at least one or maybe all of those firms would consider the possibility of entering the U. S. market at some time in the future.

JUDGE BARNES: Those are the three firms you mentioned?

THE WITNESS: Yes, Your Honor, that I previously stated.

By Mr. Youngwood:

Q I would like to ask a question which might summarize your answer for the two previous questions I asked, and ask who is the most likely entrant or who was the most likely entrant prior to December 1973 into the United States industrial gas market ---

MR. TOPKIS: I take it that question calls for the witness' perception.

JUDGE BARNES: In your judgment or perception.

THE WITNESS: I would have to say the most likely entrant of the two firms I mentioned would have been the British Oxygen Company.

By Mr. Youngwood:

Q What method of entry do you believe the British Oxygen Company could have used to enter the United States market for industrial gasses in late 1973?

A Of course, they have already chosen one method which we, of course, know about. Other methods available, of course, are the construction of an air separation plant capable of producing liquid gas products, to serve a particular market area of the United States within economic distribution radius from that facility. They could bid for a base load pipeline gas supply opportunity from one of the emerging new markets and then add incremental capacity to that facility in order to serve not only the base load customer, but the surrounding industrial market, or they could acquire one of the smaller regional producers and add new capacity to that regional producer's production capabilities and expand their market penetration that way.

These would be the four logical ways that would be open.

Q Is it your business judgment that the use of any one of these four ways would have produced a successful entrant?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: I believe this is going a little far afield. I think we have gone far enough along this line.

By Mr. Youngwood:

Q Are there any trade associations of which Air Products is a member?

A There are many associations in which Air Products is a member, yes, sir.

MR. TOPKIS: I will have no objection to counsel leading the witness on this subject.

JUDGE BARNES: He asked "any associations." Can you limit it to industrial gasses?

MR. YOUNGWOOD: I was about it.

By Mr. Youngwood:

Q Would you tell us then the names of the associations to which you belong as a result of your production of industrial gas?

A In the United States?

Q Yes, sir.

A The Compressed Gas Association and the Independent Oxygen Manufacturers Association.

Q Mr. Baker, is the correct name of the last association mentioned "International Oxygen Manufacturers Association"?

A I remember it as IOMA. It could very well have changed its name to "international." I would have to defer to someone else for the current correct title.

Q Can you tell us please the requirements for membership in these organizations?

A I believe one has to be a ---

MR. TOPKIS: Excuse me, I don't mean to interrupt, but I am obviously doing so. Your Honor will recall Mr. Leonard of the CGA will be here to testify and I think there are better ways than taking up Mr. Baker's time.

JUDGE BARNES: I think that is correct.

By Mr. Youngwood:

Q Can you tell us why your company belongs to these two trade associations?

A Basically to enhance the well-being of the industry, to assure proper standards of performance of the basic producers, to exchange technical information regarding safety and good standards of production and operation.

Q What areas of the country are industrial gasses marketed by

Air Products & Chemicals?

A We market industrial gasses throughout the entire United States with the exception of the northwest portion of the United States -- Oregon and Washington.

Q What areas of the country are industrial gasses produced by you?

A In almost all of these other areas except the Northwest.

Q Could you tell us approximately ---

A To qualify that, we don't have a plant in every state, but it is possible to have a plant which would permit us to distribute products over many different states.

Q Can you tell us approximately how many producing industrial gas plants you have?

A I have not counted them recently. It would be in the order of 35 to 50, something in that category.

Q Mr. Baker, do you sell industrial gasses in Canada?

A Yes, we do on a limited basis.

Q Where are these gasses produced?

A At the present time from our Northern United States plants.

Q You stated at the present time. Do you have any plans in that regard?

A Do I have to answer that question, to tell what our future plans are?

JUDGE BARNES: You might withdraw that question, Mr. Youngwood.

MR. YOUNGWOOD: All right. I will withdraw the question. May we have a one-minute recess?

JUDGE BARNES: Are there any announced plans?

THE WITNESS: We have announced our intention to build a cylinder-filling plant in the Toronto area.

JUDGE BARNES: How about in the United States?

THE WITNESS: Yes, we have announced intentions to build several plants in the northern tier portion of the United States, a plant in Toledo and also Albany.

MR. WADE: Would you keep your voice up?

THE WITNESS: We announced plans to construct a plant near Albany, New York and Toledo, Ohio. Both plants would be strategically located for serving the Canadian market from those facilities if we chose to do so.

JUDGE BARNES: Were these announced prior to December of 1973?

THE WITNESS: I would have to check to be rather precise. It might have been just about that time, but I just don't recall precisely what date they were announced.

By Mr. Youngwood:

Q What is the method of marketing the gasses which are produced in the United States and sold in Canada or used in Canada?

MR. TOPKIS: I did not hear that question. Could I have it read back?

(The reporter read the question.)

MR. TOPKIS: By Mr. Baker's company?

JUDGE BARNES: Yes.

THE WITNESS: These products are produced in our regular U. S. facilities and are shipped by road tanker or by cylinder truck to Canada. The liquid products are shipped directly to Canadian consumers. The cylinders are normally delivered to a stocking location from which they are then redistributed to individual customers.

We also have one or two, and I can't quite recall, distributors who purchase products from us in bulk and redistribute to individual Canadian customers.

JUDGE BARNES: These are basically the same methods used in this country?

THE WITNESS: Yes, sir, essentially the same. Normally in each market we would have a cylinder-filling facility where we could fill individual bottles from bulk storage and we are in the course of constructing such a facility in Canada at the present time.

By Mr. Youngwood:

Q What is the duty on such gasses produced in the United States and used in Canada?

JUDGE BARNES: What is the relevance of the Canadian market?

MR. YOUNGWOOD: The British Oxygen Company has a subsidiary in Canada entitled Canox. We propose to show that

Canox was a potential entrant into the United States industrial gas market and it could, in fact, have easily sold gasses produced in Canada to customers here in the United States.

JUDGE BARNES: You are going the reverse now, aren't you?

MR. YOUNGWOOD: Right now what I intend to show now is that there is not a great deal of difficulty in selling gasses which are produced here for use in Canada and given that, there would be little difficulty in that regard, I would then attempt to establish the degree of difficulty that might exist in selling gasses produced in Canada and sold here in the United States.

THE WITNESS: The question has to do with duties imposed by Canadian authorities on U.S. shipments into Canada?

MR. YOUNGWOOD: Yes.

THE WITNESS: I think the duty going that way is approximately 10 percent. Again that is a recollection rather than a specific knowledge.

By Mr. Youngwood:

Q Can you tell us whether you have knowledge of the duty which is charged from Canada back into the United States?

A Yes, Canadian duty, and we are importing some products from Canada into the United States, is 5 percent coming from Canada into the United States.

Q Mr. Baker, does Air Products find that it is operating at a considerable disadvantage by virtue of the duty imposed in transporting its products from the United States to Canada?

A Yes, there is an economic penalty, of course, that is significant in relationship to the underlying profit margin, but we are prepared to absorb that penalty in order to build up a position in the Canadian market.

Q Are there any Canadian companies in your business judgment that could market industrial gas in the United States? This is from Canada.

A That are not already doing so?

JUDGE BARNES: You said "could"?

MR. YOUNGWOOD: Yes, sir, I said "could."

THE WITNESS: Conceivably, all of the principal Canadian producers could market gasses in the United States. Of course, the two principal producers there -- or two of the three, I guess, already have affiliated companies in the United States. That is Canadian Liquid Air, which is part of the Liquid Air group, and Union Carbide's Canadian Division, which, of course, is affiliated with Union Carbide of the United States.

The other producers conceivably could export product to the United States from Canada. We are buying product, so some of those producers are exporting products to ourselves for resale in the United States at the present time.

By Mr. Youngwood:

Q Would you tell us the names of the other producers in Canada?

A In addition to the Union Carbide and Canadian Liquid Air, it is Canadian Oxygen Company, Liquid Carbonic of Canada. I think they are the principal other producers.

MR. YOUNGWOOD: Would you read back his answer please?

(The reporter read the answer.)

By Mr. Youngwood:

Q Is Canadian Oxygen Company otherwise known as Canox?

A Yes.

Q Are you personally aware whether Canadian Oxygen Company or Canox is a subsidiary of the British Oxygen Company?

A I believe they are.

MR. TOPKIS: He will stipulate Canox is associated and is a well-loved affiliation of British Oxygen.

MR. THURMAN: I think the stipulation should work both ways. I tried to forestall a lengthy cross-examination yesterday by a stipulation. I would appreciate it if Mr. Topkis would not interrupt.

JUDGE BARNES: I think it is helpful.

MR. THURMAN: I agree 100 percent and that is why I say yesterday we could have avoided an hour of laborious cross-examination where we got nothing.

JUDGE BARNES: We avoid what we can avoid.

MR. THURMAN: He should stipulate, too. It works both ways. I think Your Honor should force him to stop such a laborious cross-examination as we represented by stipulation.

JUDGE BARNES: We will take up these matters as they are presented.

By Mr. Youngwood:

Q Mr. Baker, by reason of your experience and dealings with others in the industry, do you have reason to have knowledge of the overall performance of industrial gas firms in the United States since 1970?

A I am not sure what you mean by "performance." Would you clarify that for me please?

Q I am referring to the growth of sales volume. I am referring to the trend of prices and I am referring to the new uses that may have developed, and I would refer to a prognosis for the industry.

A Since 1970?

Q Yes, sir.

MR. TOPKIS: Could we have those one at a time?

JUDGE BARNES: Let's bring forth a new question, Mr. Youngwood. What is the prognosis for growth?

MR. YOUNGWOOD: I asked Mr. Baker if by virtue of experience and dealings with others in the industry he had reason to have knowledge of these particular factors.

JUDGE BARNES: Give the factors one at a time.

By Mr. Youngwood:

Q I am referring to a trend in prices, sales volume, new uses and a prognosis for the industry.

MR. TOPKIS: I repeat, may we have them one at a time?

JUDGE BARNES: We will have the answer one at a time.

MR. YOUNGWOOD: I have asked only if he has reason to have knowledge of these factors.

JUDGE BARNES: Can you answer "yes" or "no"?

THE WITNESS: Yes, I have knowledge.

By Mr. Youngwood:

Q Would you compare please the prognosis for the industry as it existed in 1970 and the prognosis for the industry as it exists today in 1973?

MR. TOPKIS: In what respect -- prognosis as to price, as to new developments, what?

JUDGE BARNES: Profits and growth?

MR. YOUNGWOOD: I would be talking about growth of sales volume. I would be talking about the trend of prices, and I could be talking about new uses which might exist in the future. I have not encompassed within this any discussion of profits.

THE WITNESS: If you are talking about the overall general prognosis for the future, I would say for 1970 and today it would be comparable if you are projecting forward what you would anticipate, I think, the difference between 1973 and 1970 is that we have seen a realization of some of the prognosis for the future having occurred in that intervening three years. Volume shipments have expanded considerably since 1970 through 1973. Prices have firmed.

New developments have occurred which have expanded the demand for industrial gasses which has led to a situation where the industry today is running at nearly full capacity, and where there are shortages of key products in particular market areas.

MR. YOUNGWOOD: Your Honor, may we have a three-minute recess?

JUDGE BARNES: Let's take a ten-minute recess. I trust you are almost completed with your direct examination?

MR. YOUNGWOOD: Yes, I would suspect it will not last too much longer.

JUDGE BARNES: That is a very big help, "not too much longer." How much longer?

MR. YOUNGWOOD: I would say not more than half an hour.

XXXX (Whereupon, a brief recess was taken.)

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JUDGE BARNES: Back on the record.

MR. HENRY SAYLER: I am counsel for Air Products and for the witness.

With respect to Exhibit 304 which your Honor rejected this morning, the affidavit under discussion, during the recess I have spoken with counsel for the Commission and with Mr. Topkis and have stated that will be available at my office which is at 888 - 16th Street, N.W.. The material which underlies that affidavit that Mr. Topkis or any of his associates subject to the protective order are welcome to come and look at it at such time, given the exigencies of the case.

If there is anything incomprehensible aspects of it, we will be glad to cooperate.

MR. WADE: Is that extended to all counsel?

MR. HENRY SAYLER: That is extended to all counsel in this case.

JUDGE BARNES: I would hope we could dispense with calling Mr. McGinnis.

MR. TOPKIS: I would hope so, your Honor.

MR. YOUNGWOOD: Your Honor, I would like to re-offer this conditionally.

JUDGE BARNES: Re-offer it at a later date after Mr. Topkis has had a chance to look at it.

Proceed.

By Mr. Youngwood:

Q By reason of your experience and dealings in the industry, would you have reason to know the major companies which might have entered the industrial gas market in the United States since 1958?

A Who did or might?

Q Who did.

MR. WADE: I think the question calls for a yes or no answer.

THE WITNESS: I am trying to get clarification of the market -- who actually did enter the market and they were not prior participants in the market.

By Mr. Youngwood:

Q Yes.

A Yes, I believe I am knowledgeable about that.

Q Will you tell us the names of those companies, please?

A The Exxon Corporation acquired ownership of the American Cryogenic. I presume that is an entry of a new company into the industry.

Houston Natural Gas acquired ownership of Liquid Carbonic Corporation. The French firm L'Air Liquide through a combination of their American and Canadian affiliates have acquired a number of regional producers in the United States market.

That is all that comes to my mind as new entrants not previously participating in the production of gas. There may have been others but I think Gardner Cryogenics who would have been a new entrant in association with Phillips Petroleum in the production of helium gas, and there may have been some minor firms such as you mentioned earlier, Southwest Cryogenics, Carbon Dioxide, and so forth.

One other one does come to mind. The Dow Chemical people for a time being did enter the market for a specialized fuel gas and then they subsequently dropped out of the market and sold that interest to the Air Reduction Company.

Q By reason of your experience and dealings would others in the industry, do you know the names of those firms in the United States industrial gas market which have gone out of existence since 1958 or which have been acquired since that time?

A I don't know if I can recall all of them.

The Oxygen people sold their interests in American Cryogenics to the French group, to their American affiliate of the French group, Liquide Air.

Industrial Air Products in the Northwest part of the United States has also been acquired.

Dioxygen Company in the Arizona area was acquired. Gulf Oxygen Company has been acquired. As I said the

Liquid Carbonic Corporation's ownership changed from General Dynamics to Houston Natural Gas.

There may have been other regional producers who also merged but their names just don't quickly come to mind.

Q Did Air Products and Chemicals acquire the assets of any gas producers during this period?

A Yes. Are you talking from 1958 onward?

Q Yes, sir.

A Yes, they did.

Q Can you give us the names of the companies acquired?

A I am not entirely clear on dates. Can I have counsel's assistance in requiring the actual date because 1958 is a precise date.

JUDGE BARNES: I don't think it is proper to ask for assistance. How important is this line of questioning and how will it add to the record?

MR. YOUNGWOOD: We propose to establish since 1958 the number of full line producers in the United States has diminished considerably and this is pertinent to the concentration in the industry.

JUDGE BARNES: This evidence is not telling me anything. I don't know who Industrial Air Products is or was or what they made or Gulf Oxygen. I don't know who they were or what they made.

Is there not some better evidence you can produce along this line?

MR. YOUNGWOOD: Yes, sir, we intend to establish somewhat more about the operations of these companies as they were through calling additional witnesses in the future.

JUDGE BARNES: Continue. I just wanted you to know this evidence is not very helpful.

By Mr. Youngwood:

Q Did you acquire Southern Oxygen Company?

A Yes, we did.

Q In 1961 or thereabouts?

A Yes.

Q Atlanta Oxygen Company in 1961 or thereabouts?

A Atlanta? That name does not strike a bell with me, no, not Atlanta.

Q Delta?

A Delta Oxygen, Yes, that might have been the parent company.

Q Hill Industrial Gas Company?

A Yes.

MR. TOPKIS: Could we have the names again.

JUDGE BARNES: The reporter can read back the answers.

(The reporter read the answers.)

By Mr. Youngwood:

Q Do you know whether Chemetron Corporation acquired any companies during this period of time?

MR. TOPKIS: The President of Chemetron is scheduled to testify as a Commission witness. I think he would be the best source of such information.

JUDGE BARNES: I agree, Mr. Topkis.

By Mr. Youngwood:

Q Would you please describe briefly the operations of Southern Oxygen, Delta Oxygen and Hill?

JUDGE BARNES: As of what date?

MR. YOUNGWOOD: 1961 as of the date they were acquired.

THE WITNESS: They were a regional producer of industrial gases. In the case of Southern Oxygen they were headquartered in Washington, D.C. and had operations principally in Virginia, Maryland, North Carolina, Kentucky and Tennessee. I think those would be the principal states in which they conducted business.

By Mr. Youngwood:

Q Can you describe for us, please, the approximate sizes of Southern, Delta and Hill?

A I believe at the time of acquisition, Southern Oxygen sales would have been of the order of $12 million.

Delta would have been in the order of, say, $3 million.

Hill would have been in the order of $1-or $1.5 million.

These are recollections and not necessarily precise information.

Q Mr. Baker, do you have reason to have knowledge of the climate of the industrial gas market in Great Britain in 1957?

MR. TOPKIS: Objection, your Honor. The climate was foggy but other than that --

MR. YOUNGWOOD: Is that the basis for the objection?

JUDGE BARNES: Why are we going back to 1957 and the United Kingdom?

MR. YOUNGWOOD: In 1957 Air Products entered the industrial gas market in Great Britain. I propose to establish the nature of economic conditions as they may have existed in the industrial gas industry at that point in time and to establish, if I can, the facility with which Air Products might have entered that market; and to establish the similarity or differences that might have existed between the U.K. market in 1957 and the American market in 1973 when an entry was made here.

JUDGE BARNES: Do you think that is very material to your case?

MR. YOUNGWOOD: We believe that it is, sir. We believe it is helpful to establish that Air Products was able to enter the United Kingdom market in 1957 in the way that they did.

I think that the record should contain information which will display the manner in which Air Products was able to establish a base of operations in a country which we believe was pretty well represented at that time.

JUDGE BARNES: All right. I will let you proceed.

MR. TOPKIS: If your Honor please, just to suggest the dissimilarities of conditions, one, the difference of 17 years --

MR. YOUNGWOOD: I object.

JUDGE BARNES: Let him state his objection.

MR. YOUNGBLOOD: He is testifying.

JUDGE BARNES: It is in the form of objection.

MR. TOPKISS: It is an entirely different economy and in 1973 they were the only industrial producers of gases in Great Britain.

Also, I am advised they were subject to the order of the so-called monoplies division, the antienforcement body under British law that required it to post its prices on a nationwide basis. I don't think I have to go much farther to suggest that we are dealing with a totally incomparable set of conditions, and while I would be interested to hear Mr. Baker's story, I think we would waste an awful lot of time because then we would have to straighten out any errors he might have made.

JUDGE BARNES: You think the evidence might not support what he will say, but I will permit Mr. Youngwood to go ahead.

By Mr. Youngwood:

Q Were you familiar with the market for the production and marketing of industrial gas in Great Britain in 1957?

A Yes.

Q Would you please describe the basis for your knowledge?

A I was managing director of Air Products Control subsidiary in Great Britain which was established at that time and commenced the establishment and building of our businesses in Great Britain during the period 1957 through 1967.

Q Would you contrast please the United Kingdom market for the production and marketing of industrial gas in 1956 with the United States' market in late 1973 in the following way is, please.

Would you describe the growth potential as you foresaw that potential in Great Britain in 1957?

A Well, we entered the market in 1957 primarily because we did foresee a significant growth potential for the use of large volumes of oxygen in serving the steel industry in Great Britain.

It appeared to us there would be opportunities to build large-scale plants which would be more economic than those that existed at that time, and for us to carry on the pattern of our own marketing programs as established in the United States of building on-site plants and supplying base-lead customers by pipeline over the fence from those facilities and adding incremental capacity to those facilities to serve the so-called merchant market or market served in liquid or cylinder gas form from those production facilities.

This turned out to be the pattern of our development in Great Britain during that period of time and really up through today.

Q Were you able to expand your share of the market in due time?

A Yes, we were.

JUDGE BARNES: How did you first enter the British market?

THE WITNESS: We first entered as a joint venture between our licensee and ourselves. We had a licensee who manufactured small size air separation plants under a license from ourselves. When the demand for large -- scale plants became evident for serving the steel and subsequently the chemical industry, our licensee felt they could not keep with that and invited us to join with them in pursuing that particular market opportunity so we formed a 51-49 venture in Great Britain and they turned over to that company in Great Britain their manufacturing facilities to this new joint venture.

JUDGE BARNES: Prior to that time you had only built plants?

THE WITNESS: We only licensed the Buttily Company. We had no gas operations in Great Britain.

By Mr. Youngwood:

Q Did your licensee have any gas operations?

A No, they only sold plants. They were basically a machinery builder.

Q Do you recall the volume of sales of your licensee at the time of your entry?

JUDGE BARNES: In what, Mr. Youngwood?

THE WITNESS: In the industrial gas equipment business or in total size.

By Mr. Youngwood:

Q In total size?

A I honestly can't recall. Anything I would say would be a guesstimate. I would guess their sales are on the order of $10 million but I would have to say that is an order of magnitude guesses.

Q Mr. Baker, who are your competitors in the United Kingdom in the marketing and production of industrial gas at the time of your entry?

A The British Oxygen were the principal producers. There was a very small regional producer in the Northeast section of the company by the name of Saturn who had approximately 1 percent of the market at the time of our entrance.

Q Mr. Baker, will you contrast, if you will, the difficulties Air Products had in entering the industrial gas market in Great Britain in 1957 with the difficulties as you envisioned them in 1973 for a firm to enter the United States market for industrial gas.

A You will have to remember in 1957 Air Products was a very small company. We had total worldwide sales at that time of about $30 million.

So, we were not a large company in our industry. We were even small by industry standards in the United States market.

So, we really had to start out on a kind of tip-toe approach building relatively small size plants which were within our financial means at that time and serving very local markets that could be reached from such small-sized facilities.

But gradually as we signed customers and added business, we were able to build a progressively larger size plant or plants and over the ten-year period grew in size to the point where we could build facilities equal in size and competitive costs to the principal producer in that market.

But it was a long-term build-up from very small foothold position to our present posture in the market place there today.

Q How would you contrast those difficulties which may have existed in Great Britain in 1957 with the difficulties as you envision them here in the United States in the industrial gas market in 1973?

A For Air Products, it was a very difficult thing because over the physical size of our company and our worldwide, if you will, reputation was not very well established at that time. This was the first overseas markets for Air Products.

I was the first man to be located abroad for Air Products so everything was a rather new experience for us so we had to proceed very slowly.

Markets that we would enter today we could move forward much more vigorously with greater experience and knowledge and with larger scale facilities than was possible for us to do at that time.

Q When I talk in terms of 1973 in the United States, I am referring to a company not now in the market such as BOC might have found themselves.

A British Oxygen Company is a substantial larger firm with much more international trading experience operating in world markets today than Air Products possessed in 1957. Their size is several orders of magnitude greater than Air Products was in 1957. Their worldwide experience in serving in markets throughout the world is significantly greater than Air Products possessed in 1957.

Their capital and technical and marketing expertise far exceeds that which Air Products possessed in 1957.

Q Mr. Baker, I have just about come to the end, but I would like to ask you a question with respect to the operations by Standard Oil Company of New Jersey and its American Cryogenics subsidiary during the 1960's.

Do you have any reason to know or reason to believe by virtue of your experience in the industry the reason that Standard Oil of New Jersey sold its American Cryogenics subsidiary?

MR. TOPKIS: Objection, your Honor. That would call for hearsay.

JUDGE BARNES: I think so. I think you had best call a witness from Standard Oil. Aren't you calling Liquide Air that acquired American Cryogenics?

MR. YOUNGWOOD: Yes.

JUDGE BARNES: Would that not be a better source of information for you?

MR. YOUNGWOOD: Your Honor, I have asked Mr. Baker if he has reason to have knowledge if by virtue of his dealings in the industry he has no reason to have such knowledge, then I would cease any further questions.

JUDGE BARNES: We will see how far you can go.

MR. WADE: All he can know is hearsay. He cannot know what Jersey Standard thought about in the privacy of their own board room and what they wanted to do.

JUDGE BARNES: What will find out about his knowledge?

THE WITNESS: My knowledge would have to come from industry conversations. We had no direct dealings with Exxon on that subject.

I have heard from responsible members of the industry that Exxon --

MR. TOPKIS: Objection.

MR. WADE: Objection.

JUDGE BARNES: I think so.

MR. TOPKIS: It is double hearsay.

JUDGE BARNES: Unless there was some published report that you saw, Mr. Baker.

THE WITNESS: No.

By Mr. Youngwood:

Q Mr. Baker, as a result of your experience and dealings with others in the industry and your years in the industrial gas market, do you have an opinion to render as to the reason that Standard Oil Company of New Jersey was unsuccessful in its attempts to market industrial gas in the United States.

MR. TOPKISS: I object on the ground and it calls for hearsay.

JUDGE BARNES: I think it does. If this is important to your case, call a witness.

MR. YOUNGWOOD: I have asked if he has an opinion.

MR. TOPKISS: That opinion is not proof. That is the whole problem.

JUDGE BARNES: Exactly.

Are't you calling a witness from Liquide Air?

MR. YOUNGWOOD: Yes, we are calling a witness from Liquide Air. I think the reasons that a company enters the field and the reason a company fails especially can be different depending upon who it is who is mouthing the reasons.

I believe this is a matter which depends upon the person to whom the question is asked. I believe that by virtue of Mr. Baker's experience in the industry, by virtue of certain materials which are published, which are public material, I think it is very possible that Mr. Baker can render an opinion which will be of value.

The opinion of Mr. Dempster might be entirely different.

JUDGE BARNES: If you have the published material you can use it in your examination of Mr. Dempster.

MR. THURMAN: This man is an expert and I think he qualifies as an expert in this field. He should certainly know why a company was not successful. We want an expert opinion why Exxon could not operate successfully as a company.

I don't think Mr. Dempster who bought the company would know any more first-hand than this expert would know.

JUDGE BARNES: There has been no showing that Mr. Baker has any inside information as to the operations of the company.

I think it would be sheer speculation on his part. It might be logical speculation but it is still speculation. I feel you should call a witness from the company and examine him.

I am going to prohibit you from continuing this line of questioning.

MR. THURMAN: May I make one more statement.

Certainly he would know whether people are competing successfully in the market.

JUDGE BARNES: You could ask him something like that but don't ask him why they sold the business. Lay some foundation as to where he competed and how he competed.

By Mr. Youngwood:

Q In 1964, did you in your business judgment believe that Standard Oil Company of New Jersey had marketing expertise sufficient to cause the operations of American Cryogenics to be successful.

MR. TOPKIS: Objection.

JUDGE BARNES: That is a question calling for hearsay and speculation.

MR. YOUNGWOOD: Your Honor, what we are attempting to establish is the number of companies that have marketing expertise in this field is very, very small. If we are not permitted to ask people who are expert in the industry whether a particular company had marketing expertise, whether they believe a particular company had marketing expertise, I think we are being prohibited from establishing an important element of our case.

I think Mr. Topkis yesterday attempted to establish that other companies might have marketing expertise in the industrial gas market. All we are trying to do is establish that Exxon for instance might or might not have that marketing expertise.

JUDGE BARNES: I am not sure he is competent to testify about the marketing expertise of Exxon.

MR. TOPKIS: In 1964, wasn't this witness in England?

JUDGE BARNES: I believe he was. I believe he was there until 1967.

MR. YOUNGWOOD: I have no further questions. We thank you for appearing.

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CROSS EXAMINATION

By Mr. Topkis:

Q Mr. Baker, what is the standard size if there be one air separation unit that makes economic sense today? Could you indicate the range, if you will?

A It depends very much, of course, upon the products that you want to produce and whom you wish to sell them to. It is possible to build an oxygen plant of 15 tons a day to sell to a municipality that wants to produce purified water from their waste sewage plant.

A large steel company mightrequire an oxygen plant of a thousand to 2,000 tons to economically satisfy its requirements. It depends very much on the particular application that you have in mind.

Q Let's suppose I want to go into the general merchant business, selling the full range of industrial gases and I want to have my own air separation unit.

What size would you advise me to build as a matter of sound economics?

A The general size of such plants that are being built today areapproximately 250 tons of liquid producing capacity.

Q Do you happen to know the capacity over any air separation unit that Canox owns today?

A No.

Q Do you know whether Canox owns an air separation unit?

A I believe but not precisely. I believe they do have a small air separation plant.

Q Do you happen to know whether Canox supplies all of its own requirements of air separation gases, atmospheric gases?

A No.

Q Would it surprise you to have me suggest that Canox is a net purchaser of atmospheric gases?

A No, it would not surprise me, no.

Q So far as your company is concerned, do you sell throughout Canada?

A No.

Q Just in the border fringe area along the border with the States?

A Yes.

Q You spoke of your company as having, your number was 35 to 50 plants. Did you include acetylene plants in that range?

A I think the question was directed about air separation plants at the time, and my response was in consideration of air separation plants.

Q If we added acetylene plants how many plants would you give as a total?

A When you talk at acetylene plants I presume in this context you mean plants which convert calcium carbide to acetylene gas?

Q Yes, right.

A My guess and it would be a guess would be something of the order of 10 to 15 such plants in various locations throughout the United States.

Q You manufacture gases other than acetylene and atmospheric gases; is that right?

A Yes.

Q How many plants do you have devoted to those various other gases?

A We would probably have something over the order of 10 to 15 hydrogen plants, large carbon dioxide plant -- they would be the principal ones, I believe.

Q I am sorry.

A They would be the principal ones, I believe.

Q Do you manufacture any carbon monoxide?

A Yes, we do.

Q Are there any plants devoted to that?

A Yes.

Q How many, sir?

A We have three production units which simultaneously produce carbon monoxide and hydrogen located in the Texas area. We have one plant located in West Virginia that

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liquefies carbon monoxide.

Q How about carbon dioxide, CO_2?

A We have one such plant.

Q Have I left out any of what you consider the industrial gases?

A No, I don't think so.

Q Do you manufacture any of the fuel gases?

A Do you include acetylene in that?

Q I thought we had already covered that. Perhaps one does as a matter of industrial terminology.

I had reference to such gases as propane.

A Those gases are really part of the petroleum industry.

Q You don't regard them as industrial gases?

A I don't believe anyone does.

Q I would like to introduce you to Mr. Flamm who testified yesterday.

How about nitrous oxide?

MR. YOUNGWOOD: May that comment be stricken?

JUDGE BARNES: Yes. We will comment about the meeting. I think it may have overtones, I don't like to see in this record.

By Mr. Topkis:

Q How about nitrous oxide. Do you manufacture nitroud oxide?

A No.

Q What criteria do you employ, Mr. Baker, in deciding what constitutes an industrial gas?

A Criteria we use is the principal atmospheric gases and those principal gases which are bought by our industrial customers in conjunction with those principal atmospheric gases.

This would be, in addition to atmospheric gases, acetylene, hydrogen, helium, carbon dioxide, carbon monoxide is a more recent addition but it certainly has industrial uses so you could certainly classify carbon monoxide as a principal industrial gas.

Q Who are your principal types?

A They cover the wide range of industry -- the steel industry, the chemical industry, the electronic industry, the food industry, the steel fabrication, aluminum, glass manufacturing.

The government is a purchaser. We supply oxygen, of course, to the medical industry in conjunction with other gas products and the transportation industry. These are the principal industries that come to mind.

Q You also sell to distributors?

A Yes, we do have distributors.

Q What proportion does your sales to your distributors bear to the industries that you have just ticked off for us?

A Now, you are asking for a breakdown of our sales.

Q Roughly.

A I would say in our case less than 10 percent of the total sales are to distributors.

Q So the balance of your sales of roughly 90 percent would be to industrial gases?

A Yes, you are relating these to gases.

JUDGE BARNES: This is dollar volume?

THE WITNESS: This is dollar volume.

By Mr. Topkis:

Q The medical profession, you said, buys oxygen from you.

Do you sell hydrogen to the medical profession?

A No, there is no application for hydrogen.

Q Nor nitrogen?

A There are some remote applications but it is not a significant factor.

Q Argon?

A No.

Q Acetylene?

A No, just for the odd repairing of equipment.

Q Would it be accurate to say that for all substantial purposes, the gas that you sell to the medical profession is oxygen?

A There is another gas which is anesthetic gas.

Q Specialized medical gases?

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A Yes, for medical purposes.

Q But not in the category of industrial gases as you use the term?

A That is right.

Q Let me ask you about the glass business, sir.

What gases do you sell to glass manufacturers?

A Oxygen and nitrogen and hydrogen, principally.

Q Argon?

A No, we don't supply very much argon.

Q No significant amount of helium?

A No.

Q Nor any significant amount of xenon or krupton?

A No.

Q Nor for that matter no significant amount of any other industrial gas?

A That is true.

Q How about the aluminum business, sir? What gases do you sell to the aluminum business?

A Oxygen and nitrogen. Those are the principal ones.

Q No great quantities of xenon, krypon or argon?

A No.

Q Nor acetylene?

A No.

Q Nor any of the other industrial gases in significant quantity?

A That is right. Oxygen and nitrogen are the principal ones.

Q You mentioned also sales to the transportation industry?

A Yes.

Q What kind of gases do you sell to the transportation industry?

A Oxygen, acetylene. Those are the principal ones.

Q You mentioned steel. I suppose steel takes a lot of oxygen?

A Oxygen, nitrogen and hydrogen.

Q No helium?

A Not in any substantial quantity, and also argon.

Q No helium nor krypton nor xenon or acetylene?

A Not in substantial uses. There would be laboratory uses and special instrumentation uses certainly for these products.

Q I suppose the chemical industry by contrast uses pretty much your full range?

A It varies from company to company and application to application. The chemical industry in some applications uses large volumes of oxygen and in other cases uses large volumes of nitrogen.

In other cases it uses carbon monoxide and others hydrogen. These would be the ones in principal demand in the chemical industry.

Q Typical customers would have to tend to have needs for specific gases but thinking of the chemical industry as a whole you think of supplying the whole industry with a full range; is that correct?

A That is correct.

Q How about steel fabrication? What do steel fabricators use?

A Oxygen, acetylene, argon, carbon dioxide.

Q If I may sum up, and tell me if I am summing up your testimony accurately, it would appear each of these industries tends to have a need for two or three gases in very significant quantity but not of the full range with the possible exception of the chemical industry we are viewing it as a whole, there was a need for a full range of industry gases as you used the term?

A When you say principally, I think that is true. When you talk about total requirements, they would need the full range for maintenance purposes, for welding purposes, for minor use, purging applications and so forth.

It would be unusual for a steel company, although it might purchase 80 percent of its requirements in a few gases, not to require the use of all of the gases in some form.

Q But a glass company --

A The same thing. They would have three or four principal uses and then they would have minor uses for the other products.

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Q You told us about Houston Natural Gas acquired Liquid Carbonic. Do you remember that testimony?

A Yes.

Q What business was Houston Natural Gas in before it acquired Liquid Carbonic?

A I believe they are in the business of supplying natural gas.

Q Liquid natural gas or gaseous natural gas?

A Gaseous natural gas.

Q There are people who liquefy natural gas?

A Yes, we are one of them.

Q Is that a large field, comparable in size, for example, to, let us say, the industrial gasses?

A The liquid natural gas industry is a burgeoning industry. It is starting to grow on an international scale.

Q Are a number of companies engaged in it?

A Petroleum companies who are in the business.

Q When you are dealing in liquid natural gas, that is a very low-temperature product?

A That is correct.

Q I suppose it is extremely explosive or at least possesses a very significant safety problem?

A Yes, it is a concentrated hydrocarbon material which can be exploded under certain conditions.

MR. YOUNGWOOD: Your Honor, I think that Mr. Topkis is extending his comments very significantly beyond the scope of our direct examination. We really did not even get into this at all or touch on it.

JUDGE BARNES: You should have. I think this is proper cross-examination.

By Mr. Topkis:

Q How is liquid natural gas moved around the country?

A It is moved in this country in a few isolated locations by road tanker.

Q And otherwise by pipeline?

A No, not by pipeline. The principal movement is from large liquefaction plants abroad in sea-going tankers akin to petroleum tankers.

Q When it arrives here or arrives at a port, how is it handled -- put onto road tankers?

A It is normally off-loaded from tankers into large cryogenic storage vessels, insulated vessels, and then it is evaporated from those vessels into the natural gas pipelines in this country which are the principal means of distributing the gas to the ultimate consumer.

Q How do you liquify liquid natural gas?

A You reduce the natural gas to its liquefaction point and then you distill off unwanted quantities and end up with essentially a pure methane in liquid form.

Q You told us before about your acquisition of three companies back in the '60s -- Southern Oxygen, Delta and Hill. Hill had no air separation unit, did it?

A No, I believe they were an acetylene producer and a distributor of other atmospheric gas products.

Q Delta did not have an air separation unit?

A I believe Delta did have a small air separations plant.

Q 10 or 15 tons a day, that order of magnitude?

A Yes.

Q Same thing true of Southern?

A Southern had two principal points, one of 25 tons a day and the other, I think, was around 15 tons a day.

JUDGE BARNES: When we speak of tons, is that 2,000 pounds weight?

THE WITNESS: Yes, the quantities in terms of cubic feet would be quite large, so you tend to express it in terms of tons.

By Mr. Topkis:

Q Can you give His Honor an industrial rule of thumb of how you convert the cubic feet to tons?

A At U.S. terms at a temperature of 70 degrees Fahrenheit and atmospheric pressure there are 24,000 cubic feet of oxygen, which consists of one ton weight. That is one short ton.

Q Going back for a second to Southern, Delta and Hill, did they produce any gasses other than separate gasses?

A Each had their own acetylene plants.

Q That was the extent of their production?

A Yes.

Q You were asked by Mr. Youngwood as to the identity of your major competitors. You mentioned, according to my notes, Linde, AIRCO, Chemetron, Liquid Carbonic, Liquid Air and Big Three in the industrial gas field.

A In the United States, yes.

Q On the basis of your experience in the industry down through the years, would you say that there is vigorous competition in the industrial gasses field in the United States today?

A Yes.

Q Would you say that that competition extends not only to price, but also to research and development in the new products?

MR. YOUNGWOOD: Your Honor, we didn't go into that either. I think Mr. Topkis is going beyond the scope of our direct examination.

JUDGE BARNES: Didn't you go into marketing conditions and the prospects for growth?

MR. YOUNGWOOD: Sir, we did not discuss the particular veracity of competition and as it may have existed. That is really the question to which Mr. Topkis is addressing himself. We did not discuss competition at all in that regard.

JUDGE BARNES: You went into prices.

MR. YOUNGWOOD: We asked whether prices had risen. I do not have any problem with Mr. Topkis asking Mr. Baker questions as to whether prices have risen.

JUDGE BARNES: He does not have to phrase his cross-examination along the lines of the questions you ask. He can explore the area generally. I think it is appropriate and I will let him continue.

By Mr. Topkis:

Q Would you answer the question please?

A Would you restate it please?

Q My question was whether the competition that you describe in the industrial gasses field is not only price competition, but also extends to competition into research and development and new processes and products?

A Yes, I think that is true.

Q Is there competition also in services?

A Yes, in technical services.

Q Support services, the usual range of competitive techniques of good companies?

A Right.

Q You were asked by Mr. Youngwood what incentives existed in 1973 to enter the U. S. industrial gasses market, according to my notes. One of the responses that you gave was that there is a limitation on production capacity. Do you remember that testimony?

A Yes.

Q By that you mean that in some areas there is a shortage of capacity, is that it?

A There is a general shortage of capacity in the United States market today.

Q Are your company and various others of your competitors moving to satisfy that shortage?

A I don't know that we will satisfy it, but we are adding capacity.

Q Specifically, sir, so far as your company is concerned, according to my notes, you have announced the planned construction of five new plants in the United States, is that right?

A I don't know how far back you are going in relating to announcements.

Q That is in your 1973 annual report, I believe, is that right?

A I think there are five plants that either are under construction or have recently been completed. That would be the only distinction here.

Q Let me ask you about some specific individual plants. You mentioned the one at Albany.

A That is under construction.

Q Is that included in the five?

A Yes.

Q There is one at Santa Clara, California?

A That plant has been completed.

Q Toledo?

A That is under construction.

Q Tulsa; Oklahoma?

A That plant probably will not be built.

Q Any others that come to mind?

A We think as part of that five there would have been an expansion at New Martinsville, West Virginia, and that plant has been completed.

Q Incidentally you are putting up a plant in Brazil, aren't you?

A Yes, we are.

Q Do you regard the Brazilian market as a potential growth market?

A Yes.

Q As a matter of fact, it is the fastest growing market in the world today in terms of capital growth, is it not?

A What do you mean in terms of capital growth?

Q Capital growth, an expanding economy based on GNP?

A I can't comment whether it is the fastest. It is certainly a growth market.

Q And it is a growth market in which the need for industrial gasses is foreseen by the industry to be very great?

A Yes.

Q You spoke in your discussion of the United States in response to Mr. Youngwood's question of new applications for industrial gasses being developed. I suppose you had in mind sewage treatment?

A That is a new application, yes.

Q There is one of those plants in operation at Chicago, isn't there?

A I don't know about Chicago.

Q Can you tell us anywhere where there are such plants in operation?

A We are supplying oxygen in Fairfax County, Virginia, for a waste water treatment plant.

Q Anyplace else?

A We have just completed a plant in Louisville, Kentucky. We are building plants in New Orleans. There will be facilities that others have built in Detroit, Middlesex, New Jersey. There are a number of those applications. There are plants going in in Oakland, California; Denver, Colorado.

Q What other new applications did you have in mind?

A Some of this, of course, is of a proprietary nature.

Q Some is what?

A Some of the new applications are of a proprietary nature, but one very significant application will be the requirement by our synthetic fuels industry, which is just coming into the fore for large quantities of oxygen.

Q To produce synthetic natural gas?

A To produce synthetic natural gas or a low-BTU gas that can be used in combustion purposes or power generation.

Q Are there any others?

A That is one. There is a large requirement coming up for the expansion of our steel industry.

Q Do you mean additional basic oxygen plants?

A Right.

The chemical industry appears to be ready to take very large quantities of oxygen for chemical purposes. It appears hydrogen will be produced in this country by combining oxygen and heavy oils in order to produce hydrogen as an alternative to natural gas, which is in very short supply.

Q You use oxygen and heavy oils -- but by heavy oils you mean petroleum products?

A Petroleum distillates.

Q So the most likely producers would be the petroleum industry?

A They are not necessarily the suppliers of hydrogen gas, which is normally supplied by the industrial gas companies.

Q Some of the companies have the technological skills to enter this field, have they not?

A I think they have technical manufacturing skills, yes.

Q Indeed some of them, in fact, are in it?

A I don't know of any case where the petroleum companies are active in the industrial gas business or supplying end products to consumers.

Q I had in mind the production of hydrogen.

A For their own internal uses, yes, I think that is true.

Q Speaking of production for internal uses, United States Steel Company owns four air separation units of its own?

A I believe that is so. I have no direct knowledge.

Q There are other steel companies that own their own air separation units?

A Yes.

Q In point of fact, you built some for various steel companies, didn't you?

A We built one that is owned by another steel company.

Q You built one for National Steel at Weirton, West Virginia?

A Yes, many, many years ago. That plant is not operating any more.

Q And you built one for National Lead in Michigan?

A Those plants were not owned initially by the steel company. Only after 15 years of purchasing gas from us did they acquire ownership.

Q They are today owned by the steel company?

A Yes.

Q You built a plant for U. S. Steel a Duluth, Minnesota, American Steel and Wire Division, didn't you?

A We owned and operated that plant ourselves and supplied gas from it.

Q And then sold it to the steel company?

A I think that is correct. I think at the end of the contract period we did sell that, yes.

Q You built a plant for the Ford Motor Company at Dearborn, Michigan, did you not?

A That is correct.

Q Will you agree with me that the Ford Motor Company, National Steel, U. S. Steel and at least three or four other steel companies would be included in the hundreds of companies you say had the resources to enter the industrial gasses field if they wanted to?

A Certainly they have the financial resources.

Q Do you know if U. S. Steel has actually studied the possibility of entering the industrial gasses field?

A I have heard they did study it at one time. I have no direct knowledge.

Q So you then think of them as a possible entrant?

MR. YOUNGWOOD: I fail to see the connection between those two questions. I think possibly Mr. Topkis can rephrase his question.

JUDGE BARNES: You went into potential entrants and he is exploring potential entrants. I believe the witness understands that question perfectly well. You may answer.

THE WITNESS: Honestly, I did not consider them a potential entrant in the full sense of the word.

By Mr. Topkis:

Q Despite the fact that you heard they were studying the situation?

A Many people study it.

Q Who are the other people studying it?

A I have heard members of the oil companies have studied the market from time to time.

Q Any others?

A It has not come to my knowledge.

Q Can you name any of the oil companies which you have heard are studying the subject of possible entry into the industrial gasses field?

A I believe Phillips has considered it and, of course, Exxon did.

Q Any other?

JUDGE BARNES: His question was "are studying it now."

By Mr. Topkis:

Q Or have studied it in the recent past.

MR. YOUNGWOOD: Aren't we getting into some strange hearsay at this time? What is the basis for his knowledge?

JUDGE BARNES: The same knowledge that you used on direct examination.

MR. YOUNGWOOD: As to whether he heard others were studying it. I had not asked whether BOC or anybody else was studying the market. I asked whether from his business judgment he had reason to formulate a judgment of his own from his experience in the industry, but I did not ask what he might have heard from asking third parties.

JUDGE BARNES: He is being asked now based on his knowledge of the industry, he has a knowledge that people have studied the possibility of entering the industry. I think it is proper cross-examination.

THE WITNESS: Those are the companies I have heard have considered it.

By Mr. Topkis:

Q Any chemical companies, for example?

A None that come to my mind, no.

Q Any natural gas companies?

A I think those gas companies that were associated with the helium conservation program in this country have contemplated entering the market for that one particular product. As you may know, the Cities Service Company does produce liquid helium and sells it largely wholesale. I believe Northern Natural Gas has also considered the possibility of marketing helium from its facilities.

Q So, in recent years you have been aware that a number of companies have contemplated or studied the possibility of entering the industrial gasses field. Is that a fair summary?

A Yes.

Q You have also had in mind the possibility that BOC and Messer Greisheim and Linde of Germany might enter the United States market?

A Right.

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Q Did you ever contemplate the possibility that the Swedish company AGA might enter the field?

A No.

Q How about the Japanese?

A No.

Q There is a Japanese company, Hitachi?

A Yes.

Q They have bid on American tonnage plant construction, have they not?

A Not to my knowledge, not an American construction.

Q In any event, there were the three gasses companies, BOC, Messer Greisheim and Linde that were studying the possibilities and you had all of this in mind.

Now the question I want to put to you is this: Did any of the awareness that you thus had in your mind at any time in recent years affect any decision you made about pricing your products in the American market?

A In the United States?

Q Yes, sir.

A No, I can't honestly say that our U. S. marketing decisions as to price were in any way affected by these possible entrants.

MR. TOPKIS: We have a number of annual reports of Mr. [illegible]'s companies, Your Honor. But I don't want to take his time. I know he is under some pressure to get out of town ---

THE WITNESS: I don't know that I like the way you phrased that. Isn't a redirect on that?

MR. TOPKIS: There are the annual reports from '66 to '73. I don't believe there are questions about that. If I may have just a moment, I may be finished with Mr. Baker.

JUDGE BARNES: On the annual reports ---

THE WITNESS: They are a matter of public record.

JUDGE BARNES: Authenticity is one thing, but the relevance of the reports is another matter.

MR. TOPKIS: It is only the authenticity I am concerned for at the moment, Your Honor.

MR. THURMAN: Mr. Topkis is under a wrong impression. He can introduce his exhibits on a case-in-chief witness anyway.

MR. TOPKIS: I know, but I did not want to take the time to do it.

JUDGE BARNES: He is worried about authenticity. I don't think we would want to call Mr. Baker to have him authenticate annual reports.

MR. THURMAN: I don't want Mr. Topkis at this time to think he is lipping in an agreement that there would be no objection.

JUDGE BARNES: I just cautioned Mr. Topkis about it.

MR. TOPKIS: Your Honor, we are concluded. Thank you very much.

MR. WADE: I have just one or two questions.

By Mr. Wade:

Q Mr. Baker, do you have any information about how many acetylene plants there are around the country industry-wide?

A No, I do not.

Q Can you tell us whether there are a lot or a few or more than there are ASUs?

A I would just venture a guess that there probably are as many dissolved acetylene plants as there are air separation plants, but it would be a guess on my part.

Q Houston Natural Gas purchased Liquid Carbonics, did it not?

A Yes.

Q Houston Natural Gas is now in the business of marketing certain industrial gasses through its Liquid Carbonics Division, is that correct?

A That is correct.

Q From whom did they purchase Liquid Carbonics?

A I believe General Dynamics.

Q General Dynamics was not in the business of producing and distributing industrial gasses other than through their Liquid Carbonics Division?

A That is correct.

Q You said, I believe, that a typical air separation unit might produce 250 tons a day of oxygen?

A The term was not "typical." I think the question was what would be considered an economic sized plant if one were to build one today. I responded it would have a liquefaction capacity of 250 tons.

Q At what radius would the oxygen be shipped from that plant to a customer?

A I would guess into 200 to 300-mile radius would be an economic distribution range.

Q If you built it in Englewood, New Jersey, you would not sell it in Englewood, California?

A No, not on a long-term basis.

MR. WADE: I don't have any further questions, Your Honor.

JUDGE BARNES: How much redirect are you going to have, Mr. Youngwood?

MR. YOUNGWOOD: I suspect it will take just a few minutes. I would say it would take probably 15 minutes if you will give us an opportunity to stretch and have about a five- or ten-minute recess. We might be able to accomplish it before having lunch.

MR. SAYLER: I would request that on behalf of the witness.

JUDGE BARNES: We will take a five-minute recess.

XX (Whereupon, a brief recess was taken.)

JUDGE BARNES: On the record.

MR. YOUNGWOOD: Your Honor, I apologize for the delay. Complaint counsel will have no redirect.

MR. TOPKIS: Could I ask one additional question? In going through my material I neglected to ask for Jencks Act material.

JUDGE BARNES: What do we have by way of Jencks Act material?

MR. YOUNGWOOD: I can bring it up to you and show you, Your Honor. We have no interview reports which are verbatim reports. I will show you what we do have.

We do have a letter that was furnished to us by Mr. Baker in which he desired to correct information which was previously given to us in an affidavit.

JUDGE BARNES: Do you have an affidavit?

MR. YOUNGWOOD: The affidavit was previously offered and will not be entered into the record as an exhibit.

JUDGE BARNES: Does Mr. Topkis have a copy of the affidavit?

MR. YOUNGWOOD: Yes, sir.

MR. THURMAN: It is a waste of time because the cross-examination is over.

JUDGE BARNES: He is going to use them for further cross-examination. He failed to ask one question.

MR. THURMAN: This is his question. He is finished.

JUDGE BARNES: It is a pretty big question.

You have handed me a statement correcting a statement in the affidavit?

MR. YOUNGWOOD: Yes, sir.

JUDGE BARNES: It is signed by the witness. I think we should give Mr. Topkis a copy of this letter.

MR. YOUNGWOOD: We have every intention of doing that.

MR. TOPKIS: Is this the affidavit filed in the District Court in Delaware?

MR. YOUNGWOOD: Yes, sir.

JUDGE BARNES: I don't think this in any way relates to the cross-examination, Mr. Topkis, but I will let you decide that.

I have examined the notes given to me and they do not appear to be substantially verbatim recordations of the witness' testimony or statement made. They are merely complaint counsel's notes and I am not going to order these turned over under the Jencks Act.

I have one question for you, Mr. Baker.

Do you manufacture any gasses especially for the medical profession?

THE WITNESS: You say "manufacture"?

JUDGE BARNES: Or produce.

THE WITNESS: We distribute nitrous oxide and propane. We purchase them from others since our current requirements are not sufficiently large to justify manufacturing them ourselves.

JUDGE BARNES: Do you sell those gasses to anyone other than the medical profession?

THE WITNESS: We have certain distributors who would serve certain isolated hospitals away from our main distribution patterns, so that nitrous oxide and other gasses would be sold to them for resale to the hospital.

JUDGE BARNES: What is your source of those gasses?

THE WITNESS: We purchase nitrous oxide from Air Reduction Company and from Puritan-Bennett.

JUDGE BARNES: Are there any further questions?

MR. TOPKIS: Just the one, Your Honor. In this letter Mr. Baker has written there appears this sentence: "Puritan-Bennett is the leading company in the sale of inhalation therapy equipment in the United States." Is that statement true?

THE WITNESS: To the best of my knowledge.

MR. TOPKIS: Since this letter corrects misstatements in an affidavit filed by Commission counsel in the District Court in Delaware, it would perhaps be appropriate for a copy to be filed with the Court.

JUDGE BARNES: If you think it is that significant, although I don't know the significance of it.

MR. TOPKIS: I will leave that to Commission counsel.

JUDGE BARNES: Are there any further questions? If not, thank you very much, Mr. Baker.

(Witness excused.)

JUDGE BARNES: We will come back at two o'clock.

(Whereupon, at 12:40 p.m. the hearing recessed, to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

2 p.m.

JUDGE BARNES: On the record.

MR. YOUNGWOOD: Your Honor, we were in contact with counsel for the British Oxygen Company last week in an attempt to determine the BOC exhibits to which they might have objection. These are Commission exhibits which we received from BOC counsel. We have not received word from them of objections to specific exhibits. What we propose to do is to offer en masse the Commission exhibits which we have received from BOC and give counsel for BOC the opportunity to object to any specific exhibits that they feel they might like to object to.

Is that satisfactory?

MR. TOPKIS: It leaves me a little puzzled. I have been through all of complaint counsel's exhibits and I have been through most of them twice, that is, those we have received -- some we have not received. I can tell them what our position is as to the first 82.

JUDGE BARNES: Why don't we take the first 82.

First of all, did we correct the numbering of any of the exhibits?

MR. KRULIA: We have corrected the numbering on the exhibits in which we had indicated errors.

JUDGE BARNES: Where I indicated errors yesterday?

MR. KRULIA: In which the document we submitted yesterday morning, Document 303, pointed out particular errors. We are now in the process of rechecking all the documents to see if there may be any such similar errors in any other complaint counsel proposed exhibits.

JUDGE BARNES: Do you want to offer 1 through 82?

MR. YOUNGWOOD: I would offer for identification Exhibits 1 through 12, Exhibits 49 through 53, Exhibits 55 through 64, and 66 through 82. As I understand what you have just stated, you have examined these particular exhibits and do have a position with respect thereto?

MR. TOPKIS: I am curious why complaint counsel is leaving out 13 to 48. I am prepared to comment on those, too, unless you don't want to offer them, which is fine with me.

MR. YOUNGWOOD: Some of them have been withdrawn. Others relate to Dr. Albert Muller. If there are no objections to the introduction of these exhibits into evidence, we would be prepared to offer them at this time as well.

MR. TOPKIS: Let me say clearly, first a preliminary matter. First, Your Honor, let me say I don't think an awful lot of the exhibits which complaint counsel are now offering are relevant, but I don't see why we should take up time arguing that. It is a lot easier to let them come in. If they prove anything Your Honor finds interesting, you can deal with them; if not, presumably they will go into limbo and no time will be lost.

I may say also as to a number of these exhibits, by letting them come in, I do not acknowledge the authority of their authors to make binding statements as to BOC. For example, a number of these documents are staff studies done by research people at BOC, and I would not think them binding on BOC unless they were adopted or accepted by management. But I am willing to have them come in as what they are; that is, staff studies or whatever, but I don't want them to come back at me as being BOC admissions.

But I am prepared to argue that at a later date. For present purposes the only documents to which we have exceptions are these: 7, 30, 44, 52, 55, 56. Let me stop there. As to 67, I have no objection to its receipt in evidence except that it being manifest hearsay, I would not want it admitted for hearsay purposes. It is a document that wound up in our files and I am willing to have it received for nonhearsay purposes; that is to say, we received it, but I don't want to admit the truth of the statements contained in it.

It is something a consultant prepared for us. I have no idea if his statements are true or not, but I am not prepared to admit they are true. If they are to be prepared for hearsay purposes ---

JUDGE BARNES: It was prepared for BOC?

MR. TOPKIS: It was prepared by a man named Muller, who was a consultant to BOC, entitled "Evaluation and Recommendatio on Structuring a North American Medical Equipment Company." Perhaps I may show Your Honor a copy of it.

JUDGE BARNES: This is the opinion of an outside consultant?

MR. TOPKIS: That's right. At the time he prepared this report he was not a member of BOC. We later hired him. There are a couple of letters he received from acountants at the very tail end. I don't question this document was in our files and we did receive it and for nonhearsay purposes I am perfectly willing to have it come in.

The same is true as to Exhibit 71, which is a proposal by the same man.

Exhibit 72 we object to across the board.

Exhibits 75 and 81 we object to their use for hearsay purposes. We would be willing to have them come in, but only for nonhearsay purposes.

We object to Exhibit 82.

There is one other problem, Your Honor, and that is Exhibit 60 is an incomplete document. I don't know any reason why our record should have the first page of documents. I would be delighted to attempt to cooperate with defense counsel to obtain a complete copy of the document.

MR. THURMAN: Of course, Your Honor, we are not going to accept the nonhearsay purposes. It was in their files. As far as No. 82, this gentleman is a president of one of their companies. They accepted this when it was in the files and I think it is admissible for all purposes unless they can show for some reason it is not authentic. Then it should be admitted for all purposes and that should go to all hearsay documents. These are out of the files, indicating they relied on these fiels and the burden shifts.

As far as the other burden across the board, I don't know what "across the board" means.

MR. TOPKIS: I will be delighted to specify.

JUDGE BARNES: I never found out the objection to 7, 35, 64 and so on.

MR. TOPKIS: First, as to 7, it is a notice of meeting of British Oxygen, a shareholders meeting, a general meeting as it is called in British practices, held February 25, 1969. It relates to electing directors and increasing capital and amending the memorandum of association of BOC, which is the British equivalent of our articles of incorporation, but I can't see a word in it that has anything to do with this case.

While I am willing to have almost anything come in, it seems to me we ought to draw the line someplace. If my friends can point out any relevant passage, I will be delighted to reconsider my position.

JUDGE BARNES: Can you take up 7 now, Mr. Youngwood?

MR. TOPKIS: Could I show a copy to Your Honor?

JUDGE BARNES: Yes, thank you.

MR. YOUNGWOOD: Your Honor, we are prepared to withdraw CX 7-A through D.

MR. TOPKIS: As far as CX 30 is concerned, and I will show Your Honor a copy of it if I may, and I apologize for some of these copies. The fault is ours and sometimes it is the fault of others.

This is a letter from a man named John D. Simpson, who is not a British oxygen man, to a man named Sam Garvin of marafino, Inc., which is not a British Oxygen-affiliated company, and it is not binding on us.

JUDGE BARNES: This was found in your files?

MR. TOPKIS: I don't know.

MR. WADE: Of course, we also object to this document, because we can't figure out from whom it went or came and it is obviously hearsay.

MR. TOPKIS: I would suspect it probably came from the files of a man named Muller, who was a consultant of ours, who has not now been for about four years. It now appears it did come from our files.

MR. YOUNGWOOD: Your Honor, if Mr. Topkis would prefer that this document be offered through Mr. Muller, we have no problem in offering it through him.

My recollection is that we received a copy of this letter both from Dr. Muller and from British Oxygen Company. We have no problem, as I say, in introducing it through Dr. Muller.

Of course, the basis for Mr. Topkis' objection will remain and also we have no difficulties if you desire it to be beneficial to possibly discuss them at this point in time as to the overall relevancy.

JUDGE BARNES: It seems to me it would be hearsay even through Dr. Muller. Dr. Muller did not write it and he did not receive it. He is quoted in the letter.

MR. YOUNGWOOD: He did receive it.

MR. THURMAN: We got forced into this. We have ones he received through BOC. We thought he would have no objection to the authenticity of these. Now he is objecting to one such as this, which we were not going to introduce at this time.

JUDGE BARNES: Calm down.

MR. TOPKIS: We are going to object to these whether they are admissible.

Perhaps we could defer it until Dr. Muller is on the witness stand.

JUDGE BARNES: I think we should defer this one until Dr. Muller is on the witness stand.

MR. TOPKIS: The next one, Your Honor, to which we object is Exhibit 44 ---

MR. WADE: That was not offered either.

MR. YOUNGWOOD: Are we discussing 1 through 82 at this time?

MR. TOPKIS: I am prepared to. Perhaps Mr. Wade is not ready.

MR. WADE: That is all right. I thought Mr. Thurman did not offer 13 through 48.

MR. THURMAN: Let me make this clear for the record. We offered certain documents that we received from BOC. Mr. Topkis said he is prepared to offer 1 through 82. We are willing to discuss 1 through 82, but we don't want any authenticity objections.

If you are going to talk about relevancy or other objections, fine, but he said he is prepared to talk about all of them and now he wants to throw them out for authenticity. We were prepared to offer the ones we did not offer through a witness. We are getting back to where we started from.

JUDGE BARNES: Let's offer 1 through 12 and I will rule on 1 through 12.

I take it in Exhibits 1 through 12 we have objection to Exhibit 7.

MR. TOPKIS: That's right.

MR. YOUNGWOOD: We have withdrawn it.

JUDGE BARNES: Mr. Youngwood is offering 1 through 12 with the exception of 7, which he is withdrawing. Is there any objection?

MR. TOPKIS: Not from us.

MR. WADE: We do not see the relevance of a great deal of what is being offered by complaint counsel, but I don't see anything to be gained by arguing about it. If Your Honor wants to receive it for what it is worth, it is all right with us.

JUDGE BARNES: I have not understood why AIRCO was not named in the complaint.

MR. WADE: We had the same problem.

JUDGE BARNES: Are you offering these exhibits against AIRCO? Could we have a statement on that?

MR. THURMAN: Mr. Nickel will state it.

MR. NICKEL: The reason AIRCO was named in the complaint, it is our theory they entered into two agreements with BOC which helped facilitate the merger of the AIRCO stock by BOC, which violated Section 5. Therefore, it is our position that AIRCO by entering into those agreements and helping BOC facilitate this merger violated Section 5 of the Federal Trade Commission Act.

JUDGE BARNES: In other words, this stock was purchased through a tender offer which was supported by AIRCO management?

MR. WADE: That is not correct.

JUDGE BARNES: I am asking Mr. Nickel if that is his position.

MR. NICKEL: That is not what I stated. They entered into two agreements to facilitate the tender offer. One was the agreement in July of 1973, which was to bring about a closer association of the two companies, and pursuant to that agreement they exchanged certain confidential records between the two companies so they could study each other's businesses.

Subsequent to that, sometime in the fall or winter of 1973, they entered into another agreement which provided for reciprocal representation on each other's board. I can't exactly recall the terms of the agreement, but the agreement helped facilitate the tender offer that was made by BOC of AIRCO stock.

JUDGE BARNES: Is it your position the agreements would be unlawful even if the merger were held lawful?

MR. NICKEL: I would not prefer to state a position on that at this time.

JUDGE BARNES: When are you going to state it?

MR. NICKEL: May I have a moment please?

Your Honor, it is our position that the Section 5 violation which has been alleged against AIRCO hinges upon a Section 7 case being established against BOC.

JUDGE BARNES: In other words, it would be lawful for BOC to have members of the Board of Directors sitting on AIRCO's Board?

MR. NICKEL: No, we are not stating that, Your Honor.

JUDGE BARNES: Assume they had not gone through with the merger or had not purchased the stock, but merely had entered into these two agreements. Wouldn't the agreements have been unlawful?

MR. NICKEL: Your Honor, these two companies are in competition with each other, so those agreements may well violate the antitrust laws, but with respect to our complaint we are not charging them with those violations. We are only concerning ourselves here with this particular merger. Because those two agreements helped facilitate the merger, we are charging AIRCO with the Section 5 violation.

JUDGE BARNES: What are you going to ask me to do -- set those two agreements aside even if the merger is found to be lawful, or what?

MR. NICKEL: I do not understand what you mean by setting the two agreements aside.

JUDGE BARNES: What do we do if the merger is found to be lawful? Are you going to permit the agreements to stand or are you going to ask for relief against them?

MR. NICKEL: Your Honor, it is complaint counsel's position if you find there is no violation of Section 7 by the stock acquisition, you would also find those two agreements by AIRCO and BOC did not violate Section 5.

JUDGE BARNES: As I read the complaint, and I may be mistaken, but BOC was engaged in the medical equipment field; is that correct?

MR. NICKEL: Yes, Your Honor.

JUDGE BARNES: And AIRCO was also engaged in the same field?

MR. NICKEL: Yes, Your Honor.

JUDGE BARNES: Do you mean to tell me if two companies who are competitors enter into an agreement pursuant to which they agree to exchange confidential data, there is no violation? You are not charging that as a separate violation of the law?

According to the complaint the agreement also provided neither company would make any offer for a period of five years to acquire any securities of the other without prior approval of the Board of Directors. That reads a little differently than I thought, but I am still concerned about two competitors entering into an agreement to exchange confidential data, you are not challenging that?

MR. NICKEL: One moment, Your Honor.

MR. THURMAN: Your Honor, we did not anticipate this at this time. Rather than sitting here and taking Your Honor's time, could we have a five-minute recess to get our position in focus where we can present it to you clearly?

JUDGE BARNES: I think maybe we had better take ten minutes.

XXX (Whereupon, a brief recess was taken.)

JUDGE BARNES: Are you ready to proceed?

MR. NICKEL: Yes, Your Honor.

Your Honor, let me refer you to the Dean Foods Company decision, which is found at 70 FTC 1146, and specifically to page 1291 where it is stated, "Accordingly, we believe that Section 5 is a proper statute under which to charge an acquired corporation where the acquisition substantially lessens competition."

That case and other cases were relied upon by complaint counsel in asking the Commission to issue a Section 5 violation against AIRCO.

It is also our position that if Your Honor found that this acquisition did not violate Section 7 and permitted the acquisition to go ahead, in effect that action would moot any further consideration of these two agreements that were entered into by BOC and AIRCO.

JUDGE BARNES: On page 7 of the complaint it reads: "The effect of the agreements by which AIRCO and BOC undertook to eliminate the potential and actual competition between BOC and AIRCO may be to unreasonably restrain trade, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5."

It seems to me the Commission has challenged the agreement between AIRCO and BOC, and also paragraph 28, "The acquisition of 4 million shares of AIRCO stock by BOC and appertaining agreements between AIRCO and BOC, as alleged above, constitute violations of Section 7 . . . and Section 5 . . ." and in the order: "It is further ordered that respondent AIRCO cease and desist from taking any steps to implement any provision of the agreements between AIRCO and BOC of July 25, 1973, and of

December 10, 1973."

Let's assume that I find the merger of this does not substantially lessen competition. Your theory is the agreement of July 25 would not constitute a violation of law?

MR. NICKEL: Without stating that it would not be a violation of section, let me just state that it would become moot because after all, the acquisition would go ahead. There would be no reason to set these two agreements aside and order AIRCO to cease and desist toward taking any further steps toward the union of the two companies.

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JUDGE BARNES: I understand your position.

MR. WADE: Your Honor, if I might address myself to this point for a minute or two, in the first place there has been discussion of these two agreements which are two of the documents that will be offered into evidence at some later point, I think we should understand what the agreements are and what they are not.

The first original July 25 agreement exchanged certain information which was confidential. Competitors even can exchange confidential information for certain proper purposes such as for licensing and that sort of thing.

Here information was exchanged in connection with a proposal of close association between the two companies. The agreement was to keep it confidential, not to let it out of the hand of those persons at BOC and AIRCO who were interested in that evaluation.

The second thing we should look at, the December 10 agreement, is that the members of the Board of Directors that each side would be entitled to on the other guy's board was only if BOC acquired a million shares of AIRCO stock. If they did not acquire any AIRCO stock then there was to be no membership on each other's board of directors.

The same thing goes with some of the other restrictions. There are clauses which give AIRCO a right of first refusal should BOC acquire the stock and then decide to sell it. That is a protection for AIRCO.

The final point I would like to make is briefly this: AIRCO has not bought anything and AIRCO has not sold anything and if BOC wanted to and AIRCO stockholders were willing, BOC could walk up to the stockholders and say give me some stock and AIRCO would be completely out of the picture.

The distinction between this and Dean Foods was that Dean Foods was a seller of the assets, a party to acquisition. AIRCO is not selling assets and it is not selling stock.

We think the Commission is wrong. We think this case does not present a merger which should be held in violation of section 7 and we think we will prove that to you.

If you hold this is a violation of section 7 these agreements are perfectly in accordance with whatever way you would go on that. They were before any acquisition of any stock of BOC by BOC from anyone and they were to protect AIRCO as a unit.

The relief saught in the complaint, there is a paragraph there which says that these two agreements should have no force and effect.

Quite frankly if a divestiture order is ordered that ends it. No relief is saught against it, so we have never understood why we were in this case. We told that to Judge Latcham and that is our position here today.

JUDGE BARNES: We will proceed with Exhibits 1 through 12.

You are offering these against both the respondents?

MR. YOUNGWOOD: Yes, your Honor, we are.

MR. WADE: We don't understand how they could be offered against AIRCO.

MR. YOUNGWOOD: Your Honor, as Mr. Nickel stated, we propose to prove a violation of section 5 by virtue of the agreement entered into between AIRCO and BOC.

The agreement lacks validity or lacks legality by virtue of the fact that it relates to an illegal acquisition of stock.

If we can show that the acquisition of stock is illegal when we believe we can show that the agreements between the two companies were also illegal.

MR. WADE: There might be some plausibility if they were agreements to merge or acquire or sell, but they weren't. The acquisition of 35 percent of AIRCO's stock by BOC last December was a series of agreements, if you want to be technically correct, between BOC on the one hand and various holders of AIRCO stock on the other.

These agreements are not agreements to merge or acquire. I still do not see how these documents can be offered wholesale as against AIRCO.

MR. NICKEL: Your Honor, if AIRCO is willing not to challenge our case as to a violation of section 7, then we are willing not to introduce one through twelve against AIRCO.

MR. WADE: We were named a respondent in this case. Complaint counsel is the one who is challenging us.

MR. THURMAN: Your Honor, I don't understand the objection by Mr. Wade. On the one hand he says he is not willing to say he is not going to challenge the acquisition.

In other words, he doesn't want documents entered. We say the agreements are there. If he wants to challenge the agreements and does not want to cross examine witnesses against the section 7 we are willing to go that far and enhance the acquisition.

So he can't have his cake and eat it, too. Either these go against him or he stays out of section 7 and sticks to the agreements.

JUDGE BARNES: The complaint says that AIRCO approved the tender offer by BOC and AIRCO -- that the agreement provided other things like members of the Board of Directors and representation on the board of directors.

I am going to receive these documents against the AIRCO.

MR. WADE: Could you read the last part?

JUDGE BARNES: Under paragraph 22 of the complaint it seems to me AIRCO's participation in the merger is being challenged, whether or not what AIRCO did was unlawful or not I don't know at this point but it being challenged in paragraph 22 of the complaint, so on that basis I will receive the merger exhibits against AIRCO.

So, if there is no objection to Commission Exhibits CX 1-A through W; CX 2-A through D; CX 3-A through S; CX 41 through D; 5-A through Z; 6-A through Z; CX 8-A through Z; CX 9-A through Z; CX-10-A through Z-12; CX 11-A through Z-10; CX 12-A through Z-80 will be received in evidence against respondents BOC and AIRCO.

(The documents referred to were marked Commission's Exhibits No. CX-1-A through W; CX-2-A through D; CX-3-A through S; CX-41 through D; 5-A through Z; 6-A through Z; CX-8-A through Z; CX-9-A through Z; CX-10-A through Z-12; CX-11-A through Z-10; CX-12-A through Z-80 for identification and received in evidence.)

JUDGE BARNES: Do you have a further offer?

MR. YOUNGWOOD: Your Honor, I think possibly we might be able to address ourselves to the question of the documents 1 through 82 to which Mr. Topkis referred. He has stated specific objections to the introduction into evidence of some of the documents.

He indicated that there was an objection to document 30. We would at this point in time offer documents 14 through 19; documents CX-21, 22, 23, 25, 26, 27, and 29.

JUDGE BARNES: CX 13 through 19?

MR. YOUNGWOOD: No, 13 was withdrawn.

JUDGE BARNES: 13 through 19, 21, 22, 23, 25, 26, 27 and 29.

Is there any objection to these exhibits?

MR. TOPKIS: I have no objection.

MR. WADE: They are technically hearsay as to AIRCO but we will not press that.

JUDGE BARNES: Do we have a copy of the exhibits for the reporter?

MR. YOUNGWOOD: We are presently gathering them together so they may be presented.

JUDGE BARNES: I will receive into evidence Commission Exhibits 14 through 19, 21, 22, 23, 25, 26, 27 and 29 in evidence.

X (The documents referred to were marked Commission" Exhibits Nos. CX-14 through 19; 21, 22, 23, 25, 26, 27 and 29 for identification and received in evidence.)

JUDGE BARNES: I take it 20 is withdrawn?

MR. YOUNGWOOD: Yes, your Honor.

JUDGE BARNES: 24 is withdrawn?

MR. YOUNGWOOD: Yes.

JUDGE BARNES: And 28 is withdrawn?

MR. YOUNGWOOD: Yes, your Honor.

Complaint counsel proposes to offer to be received Exhibit 31, 32, 33-A, 34, 35, 36, 37, 38, 40, 41, 42, and 43.

MR. TOPKIS: No objection from us, your Honor.

JUDGE BARNES: You are not offering 33-B?

MR. YOUNGWOOD: We have withdrawn 33-B, your Honor.

JUDGE BARNES: You are not offering 39?

MR. YOUNGWOOD: We have withdrawn 39, your Honor.

JUDGE BARNES: I will receive Commission Exhibits 31, 32, 33, which is identified 33-A only, 34, 35, 36, 37, 38, 40, 41, 42, 43 with subnumbers as identified in the record. I will receive these in evidence.

XX (The documents referred to were marked Commission's Exhibits Nos. CX-31, CX-32, CX-33-A, CX-34, CX-35, CX-36, CX-37, CX-38, CX-40, CX-41, CX-42 and CX-43 for identification and received in evidence.)

MR. YOUNGWOOD: It has been a few minutes since Mr. Topkis stated his objection to 44.

MR. TOPKIS: I will withdraw it. I have no objection.

MR. YOUNGWOOD: Then we propose to introduce into evidence CX Exhibits 44 through 41.

MR. TOPKIS: No objection from us, your Honor.

MR. WADE: Same objection, nothing different.

JUDGE BARNES: Your objection is hearsay as to AMRCO?

MR. WADE: I will withdraw that. I just commented it was.

JUDGE BARNES: I will receive in evidence Commission Exhibits 44 through 51, with subnumbers as identified.

X (The documents referred to were marked Commission's Exhibits CX-44 through CX-51 for identification and received in evidence.)

MR. YOUNGWOOD: Your Honor, I would have the same comment as I did with respect to 44. I would appreciate it if Mr. Topkis would restate his exhibit with respect to 52.

MR. TOPKIS: Gladly, our objection to 52 is really, your Honor, that it is a collection of hearsay. It is a document entitled, "Major Medical Distributors in the United States."

It is prepared from standard sources such as Moody's and so on. It was prepared by somebody in the research end of BOC and it is really a pile of hearsay. It was in our files. There is no question about that and I am perfectly willing to have it come in as a pile of hearsay, not that it is for hearsay purposes but for the proof of the fact that we did have this document in our files.

JUDGE BARNES: Do you offer it on that limited basis, Mr. Youngwood?

MR. YOUNGWOOD: Your Honor, we believe this is relevant with reference to the fact that BOC was concerned with the medical area at this state in time and they did conduct a study and research was done in the medical area. That is the purpose for which it is offered.

MR. TOPKIS: I am content to have it come in for those purposes.

MR. WADE: It is rank hearsay but I do not have any objection.

JUDGE BARNES: I am not receiving it for the truth of the underlying data in there, merely that it is a study prepared by BOC in their files.

MR. WADE: On that basis, that is fine.

JUDGE BARNES: I will receive Commission Exhibit 52-A through Y in evidence.

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(The document referred to was marked Commission's Exhibit No. 52-A through Y for identification and received in evidence.)

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MR. YOUNGWOOD: Your Honor, complaint counsel offers Commission Exhibit number 53 to be received into evidence.

MR. WADE: No objection.

JUDGE BARNES: I will receive Commission Exhibit 53 in evidence.

(The document referred to, heretofore marked for identification as Commission Exhibit 53, was received in evidence.)

MR. YOUNGWOOD: Number 54 has been omitted. There have been objections placed to the introduction into evidence of CX-55 and 56 and I would ask Mr. Topkis to restate his objection.

JUDGE BARNES: Are you withdrawing 54 at this time?

MR. YOUNGWOOD: Yes, 54 is withdrawn.

MR. TOPKIS: So far as 55 is concerned, Your Honor, my basic problem with it is I can't figure out what it is. It is a copy of a letter that seems to come from Harris Lake files which is a subsidiary of ours but who sent it, why -- I really have not been able to figure it out.

JUDGE BARNES: Do you intend to call a witness on this exhibit, Mr. Youngwood?

MR. THURMAN: Your Honor, I don't understand Mr. Topkis's objection. These are from their files. They relied on their files and even if it was hearsay, it is reliable hearsay. It was relied on by Respondent so the burden shifts to show what is wrong with that document. They are responsible for everything in their files and it is certainly admissible.

JUDGE BARNES: I believe his objection is what do you make out of it. He can't figure it out. What do you intend to make out of it?

MR. YOUNGWOOD: Your Honor, this document was introduced because we received it in response to a subpoena which was issued against the British Oxygen Company. One of the specifications of the subpoena asked for documents relating to sales of British Oxygen Company and their subsidiaries. This particular document demonstrates what the sales of Harris Lake were in the years in question, and it demonstrates also that Harris Lake manufactured anesthetic equipment in the United States from license from BOC and sold in the United States in fact BOC medical equipment.

JUDGE BARNES: Were they a subsidiary of BOC?

MR. YOUNGWOOD: We would take the position they were.

MR. TOPKIS: This document is dated March 7, 1973 and there is no question that Harris was not a sub at that time.

JUDGE BARNES: It was not?

MR. TOPKIS: It was not.

MR. YOUNGWOOD: At that time, the British Oxygen owned shares in the Harris Kalerific Company, which was the parent company.

MR. TOPKIS: We were 26 percent at the time. I am not really making a fuss. It is really I can't figure it out. I don't want to play guessing games with the document after it has come into evidence.

MR. YOUNGWOOD: Perhaps they can tell us from whose files they recovered this document.

MR. TOPKIS: I believe from Harris Lake.

JUDGE BARNES: Do you know whose initials are at the top of the page, Mr. Youngwood?

MR. YOUNGWOOD: We have not been informed as to whose initials they are, no.

I would suggest that the document was kept in the normal course of business by British Oxygen Company or one of its subsidiaries and it would seem to me that as such there should certainly be no question as to its authenticity since Mr. Topkis has stipulated to its authenticity.

If we want to discuss relevance, I can discuss that, but authenticity has been testified to.

MR. TOPKIS: No doubt about it. It is an authentic whatever it is.

MR. WADE: A number of complaint counsel group have said something is admissible because it is found in someone else's files. I know how I keep my files and there are all sorts of things people hand me and I would not rely on at all any time for any purpose whatsoever.

Just because it is found in my files does not mean it could prove the time of day or anything else. The question of whether it is kept in the ordinary course of business is a question of authentication. That is a good way to find out if the thing is what it purports to be.

When we know that and know what it purports to be, we have only begun the inquiry.

JUDGE BARNES: This seems to have been prepared by someone who was interested in making an offer for Harris Lake and they say 17 times 1972 earnings BOC might pay a certain figure. The top sum expressed is another figure. It says down at the bottom it looks like 2 million for 100 percent. I think the document is meaningless now unless you want to find out who wrote it or who is responsible for it.

Are you offering it to prove sales figures? I don't think this is the best evidence of the sales figure.

MR. TOPKIS: There is no question about them. We have an abstract from the book.

MR. YOUNGWOOD: They have also denied Harris Lake manufactures anesthetic equipment in the United States.

MR. TOPKIS: When did we deny that? Harris Lake has been licensed by BOC to make anesthetic machines for some time and undoubtedly has been doing so.

MR. YOUNGWOOD: If Mr. Topkis would like to refer to his response to complaint counsel's initial request for admission of fact, number 83, I believe that we might be able to clear that up.

MR. TOPKIS: Of course. Complaint consel have a little trouble with my language. I am sorry. The request was during 1972 Harris Lake manufactured medical equipment for BOC in the United States. Our answer was denied. Why, because Harris Lake was not then a sub of BOC. We owned 24 percent of the stock of its parent in 1972, and they surely were not manufacturing anything for us. So, of course we denied it. But I now state without equivocation that at the time appearing on this document CX-55, Harris, Onc. held a license from BOC to manufacture anesthesia machines in the United States.

JUDGE BARNES: As of March 3, 1973?

MR. TOPKIS: Either March 7 or July 3. It depends on whether you are using the English American formulation, but whichever the statement still goes. The English put the month in the middle and we put it -- I can't remember which of us does it which way.

JUDGE BARNES: I was going to say the British do a lot of things backwards.

Is that satisfactory for your purposes?

MR. YOUNGWOOD: In light of the recent statement made by Mr. Topkis, we will be happy to withdraw this figure.

JUDGE BARNES: Exhibit 55 is withdrawn at this time.

(The document referred to, heretofore marked for identification as Commission Exhibit 55, was withdrawn.)

MR. YOUNGWOOD: Mr. Topkis objected to the introduction of CX Exhibit 56. I would again ask him to repeat his objections if he would.

MR. TOPKIS: Your Honor, I have the same problem with this document that I had with the prior document put together by the same lady. This is another report by the BOC's Statistical Division, which relies on such publications as the Medical and Health Care Stock Market Guide for 1972-73 and Moody's Industrial Manual and a publication called Biomedical Insight and a couple of others.

I do not deny we made the report. We were interested enough to have the report made and it was in our files, but I don't admit anything of it is true.

JUDGE BARNES: I will receive it for being a report kepy in the files of BOC and I will not receive it for the truth of the information shown therein. On that limited basis, I will receive Commission Exhibit 56.

MR. WADE: Our position is exactly the same.

(The document referred to, heretofore marked for identification as Commission Exhibit 56 was received in evidence, as limited.)

MR. YOUNGWOOD: Your Honor, complaint counsel offers CX 57 through 65 to be received in evidence.

MR. TOPKIS: The only one to which I have objection there is 60. Your Honor will perhaps recall that was the document I mentioned was incomplete. We seem to have only the first page. I think we ought to get the whole document.

JUDGE BARNES: Let me ask, Mr. Youngwood, that you withhold your offer of 60 and make an effort to get a complete document and reoffer it.

MR. YOUNGWOOD: Your Honor, complaint dounsel introduced this as CX-60 rather than CX-60 A, B and C because this is all we have. We would be happy to receive it if Mr. Topkis would offer it to us, the remainder of this exhibit, and then after an opportunity to examine it, most probably to offer the entire exhibit.

JUDGE BARNES: Let me suggest you withhold your offer until you can get a complete exhibit and then make a reoffer.

MR. KRULIA: Complaint counsel offers Exhibits 57 through 59 and Exhibits 61 through 64.

JUDGE BARNES: Is there any objection to those exhibits?

MR. TOPKIS: No, Your Honor.

MR. WADE: No, Your Honor.

JUDGE BARNES: I will receive in evidence Commission Exhibits 57, 58, 59, 61, 62, 63 and 64 with appropriate subnumbers as identified in the record. I will receive them in evidence.)

(The documents referred to, heretofore marked for identification as Commission Exhibits 57-59 and 61-64, were received in evidence.)

MR. YOUNGWOOD: Your Honor, CX-65 is omitted and complaint counsel now offers CX-66 to be received in evidence.

MR. TOPKIS: No objection to 66, Your Honor.

JUDGE BARNES: Mr. Wade?

MR. WADE: No objection.

JUDGE BARNES: I will receive Commission Exhibit 66 A through C in evidence.

(The document referred to, heretofore marked for identification as Commission Exhibit 66 A-C was received in evidence.)

MR. YOUNGWOOD: Your Honor, Mr. Topkis raised objections to CX-67. I would appreciate it if he would repeat his objections.

MR. TOPKIS: Surely. This is a recommendation prepared by BOC by a consultant in its employ, Mr. Mueller, dated May 25, 1973. I have no objection to its being received as a recommendation by such consultant. We asked that it be prepared and the only objection is as to its being received for the truth of any statement there made.

MR. YOUNGWOOD: Your Honor, we have come to a parting of the ways.

MR. TOPKIS: It had to happen. A boy has to leave home.

MR. YOUNGWOOD: We believe if a document is prepared by an employee or a man hired as a consultant for BOC, especially commissioned for this purpose, that the material which is contained therein should be accepted as material reflecting the truth. To the extent that there is material in the document which might be an admission against the interests of BOC, we believe it should be treated as such.

MR. TOPKIS: I might say, Your Honor, I am really not terribly aware of any statement in it that is terribly prejudicial. I can tell Your Honor it made a proposal; namely, that a company be set up in which the author of the proposal would have 51 percent of the stock and BOC would have 49 percent and I am sure that proposal will not come as ausurprise to Your Honor was rejected. That makes me leary of the whole document.

I don't know if there is anything prejudicial in it, but it is patent hearsay and I don't want to have to go through some 20 pages to determine that.

MR. WADE: It is further removed from Airco but we do object. As far as the truth stated therein, I would suspect it would do more to clutter up the record rather than to lead to an understanding of what was going on at BOC during the pertinent period.

MR. YOUNGWOOD: May I read the first paragraph on 67-CT

JUDGE BARNES: Let me read it to myself.

I take it, Mr. Youngwood, Mr. Mueller was an outside consultant. He is an outside consultant for BOC for what purpose are you offering this report?

MR. YOUNGWOOD: Complaint counsel intend to show that the British Oxygen Company had as its goal the placement in the United States of an entity which is such as to cause it to become a very significant factor in several medical markets here. This is a document which relates to the plans of the British Oxygen Company to structure such a company. Such a company was in fact structured. This document will help to prove, we think, what British Oxygen Company really had in mind when it attempted to acquire several smaller companies and when it set about to expand its medical equipment businesses.

JUDGE BARNES: If I receive this document as being a report prepared by an outside consultant and presented to British Oxygen Company, is there anything further that you want me to find on the gasis of this document? Did they rely on this? Had they adopted it? Do want me to find that?

MR. YOUNGWOOD: I don't want you to necessarily find they adopted it.

JUDGE BARNES: Do you offer this document to prove anything other than this is a study BOC has prepared for it?

MR. YOUNGWOOD: I believe the document deals with problems BOC would have in setting up a company here in the

United States. I believe it uses ways that it could go about it, steps that it may take in order to accomplish the goals it had in mind, namely, obtaining a significant stake in the medical markets that we have alleged.

JUDGE BARNES: You don't want me to find these problems actually existed, do you?

MR. YOUNGWOOD: I want you to find a man who is presently an officer in the company said they existed on May 25, 1973. I would say in light of the fact that he was required to run a significant medical portion of their business here, he has relied substantially on what is found in this report.

JUDGE BARNES: I would say Mr. Mueller made this report and any proof beyond that you will have to introduce it in some other fashion.

MR. YOUNGWOOD: Your Honor will not allow this to show the expansion of their medical business.

JUDGE BARNES: It might have been inferred from the report, but I am not going to find necessarily.

MR. YOUNGWOOD: Unless we are to call several people from the British Oxygen Company, and we would hope not to do so, we will have to be able to find, I think, that the documents that they have in their files written by people in their employ, do have a certain sense of validity. We hope to establish that they had as their goal becoming the number one producer, number one marketer in specific markets.

JUDGE BARNES: Where does this report say that?

MR. YOUNGWOOD: It is part and parcel of an ongoing saga of sorts which shows what it is that they had in mind. We do have other documents we have submitted by state what it is they had to commit to this particular program and what type of projects might be undertaken.

JUDGE BARNES: I will receive Commission Exhibit 67 A through Z1 as being a report prepared by an outside consultant and presented to BOC for its consideration

(The document referred to, heretofore marked for identification as Commission Exhibit 67 A-Z1 was received in evidence.)

MR. YOUNGWOOD: Complaint counsel offers to be received into evidence CX 68, 69, 70 and 71.

MR. TOPKIS: If you stop at 70, then can all go in.

JUDGE BARNES: Are there any objections, Mr. Wade, to 68, 69 and 70?

MR. WADE: Other than it is hearsay as to Airco and I have no objection.

JUDGE BARNES: Commission Exhibits 68, 69 and 70 with appropriate subnumbers have been identified in the record.

(The documents referred to, heretofore marked for identification as Commission Exhibits 68, 69 and 70 were received in evidence.)

MR. YOUNGWOOD: Your Honor, Mr. Topkis has stated an objection to CX-71. I would ask him to repeat his objection.

MR. TOPKIS: Gladly. First, the document insofar as I can tell, is illegible so its probative value is doubtful. To the degree I can read it, it is the same recommendation by the same Mr. Mueller. I would have no objection to Your Honor receiving it as he received the last one.

JUDGE BARNES: At this time, Mr. Mueller was still an outstanding consultant.

MR. TOPKIS: Let me check with my advisors in the back.

MR. WADE: There are sections of our copy of this which I simply cannot read. We did not have any objection to its being received for the purpose of proving Mr. Mueller made a report to BOC and this was a copy of it.

MR. TOPKIS: Your Honor, none of the representatives of my client who are here can tell me exactly when Mr. Mueller went on the payroll, but from the fact that the document speaks of an entity to be formed, namely Medishield, I would suspect he was not on the payroll at the time. We can look into it further and advise Your Honor further.

JUDGE BARNES: I think it would be very relevant to these doctors.

MR. TOPKIS: I will find that out and advise the Board.

JUDGE BARNES: Mr. Youngwood, this document is illegible also. We have been cautioned by the secretary about receiving documents in the public record that cannot be read and reproduced. Suppose someone comes into the docket section and says I want a copy of Commission Exhibit 71 in the BOC docket? Dockets could not reproduce this.

MR. YOUNGWOOD: I would presume the reason the document is illegible is the copy that we received could not be read without a great deal of difficulty. Since that is so, I would request Mr. Topkis furnish us with a somewhat more legible copy.

JUDGE BARNES: Mr. Topkis, can we get a better copy of this exhibit from the files of BOC?

MR. TOPKIS: Your Honor, we will endeavor to obtain one.

JUDGE BARNES: I will withhold 71. Reoffer it.

MR. TOPKIS: I can advise the Court now I have been told by Mr. Allen Leslie who is sitting in the back and who is secretary of BOC that as of June 19 when the BOC board was considering employing this Mr. Mueller so he could not have been an employee on June 14.

JUDGE BARNES: Thank you. I am going to withhold receiving this, Mr. Youngwood, until you get a better copy. In the event you can't get a better copy, get together with counsel for Respondents and type out what you think it says.

MR. YOUNGWOOD: We will be glad to do that.

MR. TOPKIS: We will be very happy to cooperate, Your Honor.

MR. YOUNGWOOD: My notes indicate there was an objection raised to CX-72. I am not certain whether I am correct.

MR. TOPKIS: Yes, there is an objection to it, Your Honor, and that is we can't figure out what it is. It is a collection of some writings dealing vaguely with Airco. It comes from the BOC files dated June, 1973, and it looks as though somebody at BOC was digging into the files to see what we had on Airco.

I am prepared to acknowledge all of those facts, but I certainly would not want this document to come in for the truth of any statement made in it.

JUDGE BARNES: What do you make of this document, Mr. Youngwood? What am I supposed to glean from this document?

MR. YOUNGWOOD: Your Honor, this document was prepared, if I understand it correctly at a point in time prior to the date at which British Oxygen and Airco representatives discussed the possibility of a further union.

JUDGE BARNES: Is there any date on this?

MR. YOUNGWOOD: The date is June 22, 1973. It is Report Number 157 and it is a confidential report. It appears to me to be clear that there is a designation of the author and if it is not on this particular report that it may have been on a cover sheet which possibly might have been thought not to have been responsive to our subpoena.

This does deal with the United States gaseous environment, it deals with Airco and it discusses the very market which we are attempting to prove.

JUDGE BARNES: Do we know who prepared it?

MR. YOUNGWOOD: This is Report Number 157. It does not state on what we have or who prepared it, no, but it was clearly prepared for BOC use so that a determination could be made as to what steps BOC would take with respect to their attempts to acquire certain stock or assets of Airco.

JUDGE BARNES: Until you come up with further evidence, I will just receive this as being a report prepared on June 22, 1973, marked confidential, found in the BOC files.

MR. YOUNGWOOD: Your Honor, I would then ask that the complete report be furnished.

MR. TOPKIS: We have given everything we found.

MR. WADE: We are coming to a series of documents, in fact a rather large series of documents which prove at some time during 1973 BOC and Airco discussed certain matters, proof of which is hardly needed.

I frankly do not see that any of these documents are relevant to any contested issue in the proceeding.

Secondly, when first contact was made, the fact that somebody in BOC or somewhere else looked at Fortune 500 to find out who Airco was and what it did strikes me as not being relevant to anything in these proceedings. Therefore, we object to this one and we will object to the rest of them on the same grounds.

MR. YOUNGWOOD: Your Honor, we would be willing, I think to introduce this for the purpose of showing that on June 22, 1973, the British Oxygen Company was considering the purchase of Airco stock or assets which date was prior to the date at which British Oxygen and Airco personnel conferred.

JUDGE BARNES: I will receive it as a report found in the BOC files. We don't know who prepared it. That is a problem.

(The document referred to, heretofore marked for identification as Commission Exhibit 72, was received in evidence.)

MR. THURMAN: May I make a statement concerning the files? Maybe Mr. Topkis and Mr. Wade and I disagree on the law on this. Certainly they have relavancy objections but as far as admissibility on documents found in their files, we don't think it is proper to say it is not for the truth of the matter.

If it is their files, it is automatically in the regular course of business and the burden shifts. This is a mission they relied on. The burden shifts to Respondent to refute what is in that document.

I think that is what Lenox holds. Certainly I would not contest what Mr. Wade says as far as relevance goes.

MR. TOPKIS: There is no proof we relied on this.

MR. THURMAN: I would appreciate Mr. Topkis permitting me to finish.

They are in a better position -- I think the law holds this -- to find out who wrote it and refute anything illegal. We can not dig into their files and personnel. I think this is why the Court made that decision under Lenox. That is why it goes to them to refute this. They know why it was there, how they relied on it, and it is in the regular course of business.

We believe that is as far as complaint counsel has to go. It is omission on their part and it shifts to them. They have all the tools available to refute it. We do not. I think that is the whole purpose of Lenox.

JUDGE BARNES: I think it is your burden to tell me who wrote this.

MR. THURMAN: We tried to find out whose initials these are. I don't know about this particular document. This is serialed into their company. Somebody is in their company and they should tell us who wrote it. We are requesting admission of facts and they deny some of these are initials.

JUDGE BARNES: You are going to call BOC officials. Ask them about.

MR. THURMAN: We don't want to call them.

JUDGE BARNES: I thought you listed some as your witnesses.

MR. THURMAN: Not by name. If absolutely necessary we could backstop where we absolutely have to call but at this time we do not plan to call any of their witnesses, but if it gets down to backstock what we would have to call their witnesses, of course we would do this.

Their files -- this is not the third party -- certainly would not try to get a third party document in in this manner, but we think that the law is clear on this. The burden shifts to Respondent to show or refute anything in the document in their files and in the regular course of business.

JUDGE BARNES: I will receive Commission Exhibit 72-A through N as being a study found in the BOC file, the study being dated June 22, 1973. It will be up to you to tell me what this is, how important it is and you will have to tell me that based on something in the record.

I cannot infer it from the document because it is not in the document.

MR. YOUNGWOOD: Your Honor, my notes indicate there was an objection raised to CX-75. We would, therefore, introduce or offer to be introduced at this time, CX-73 and 74.

MR. TOPKIS: No objection.

MR. WADE: No objection.

JUDGE BARNES: I will receive Commission Exhibits 73 A through J and CX 74 A-B.

(The documents referred to, heretofore marked for identification as Commission Exhibits 73 A-J and 74 A-B were received in evidence.)

MR. YOUNGWOOD: Mr. Topkis stated an objection to CX-75. I would appreciate it if he would repeat it.

MR. TOPKIS: Yes. This is a memorandum prepared by Mr. H.S. Rich and presented to Messrs P.G. Bosonet, L.R. Dingle and J.M. Horner, dated June 27, 1973. It was a report prepared by someone at BOC. Mr. Rich had a research and planning function at BOC at the time and there is no question but that we were interested in AIRCO and had the report prepared, but we have no way of knowing whether the statements contained in it are true because they are all pulled from secondary sources such as Airco's annual reports. That is what it purports to be.

JUDGE BARNES: I notice CX-72 is our 157. Perhaps, Mr. Youngwood, that would give you some clue as to 72.

MR. YOUNGWOOD: You will note also, Your Honor, there is a cover page to this. This is exactly the same type of document we introduced. I asked Mr. Topkis to give us a cover page of this nature so we can identify it. It seems patent to me the type of cover page that exists for CX-75 also exists for the document ---

MR. WADE: It is a routing slip.

MR. TOPKIS: Of course, it is. If there was a routing slip on the other one it probably got torn off. The other one was handwritten.

MR. YOUNGWOOD: Was this prepared by H.S. Rich?

MR. TOPKIS: CX-75 was prepared by H.S. Rich.

MR. YOUNGWOOD: It would seem patent to me there is a similar cover sheet.

JUDGE BARNES: We still have problems with respect to 72.

MR. THURMAN: We would like to ask at this time if H.S. Rich connected with our number 159 that the R on the number does not mean prepared by H.S. Rich?

MR. TOPKIS: I will inquire.

I am advised, despite the fact that my friends have decided not to call any BOC executives, the back of the room is full with them so we have a bench we can call on. Mr. Paul Pisani advises me the R indicates the document was prepared by or under the supervision of Mr. Rich who had the research and planning responsibility that I indicated earlier so it is still an assertion and not factual documents.

JUDGE BARNES: I will receive it as a planning document found in the files of BOC.

(The document referred to, heretofore marked for identification as Commission Exhibit 75 was received in evidence.)

MR. YOUNGWOOD: Your Honor, you have also recieved CX-72 under the same circumstances.

JUDGE BARNES: Yes.

MR. YOUNGWOOD: My notes reflect Mr. Topkis raised objections to CX-81 and 82. In light thereof, we offer to be received in evidence, CX-76 ---

MR. WADE: Pardon my interruption. Would you take 76 alone, because I have problems with 77 and 78.

MR. YOUNGWOOD: We offer to be received into evidence CX-76.

MR. WADE: No objection.

MR. TOPKIS: No objection.

MR. YOUNGWOOD: Your Honor, may we have a short recess, please, of ten minutes?

MR. WADE: Maybe we can iron out our problem.

JUDGE BARNES: All right. We will take a ten-minute recess.

(A brief recess was taken.)

JUDGE BARNES: On the record.

MR. WADE: As far as 77 and 78 go, we do not have any objection to their being admitted in evidence, but we would request in camera treatment of both of those documents. I believe Mr. Thurman is in agreement with that.

JUDGE BARNES: Could you tell me what type of information they concern that is confidential?

MR. WADE: If I would state that I would like to have that discussion off the record or in camera.

JUDGE BARNES: Can you not tell me the types?

MR. WADE: Evaluations of Airco by BOC.

JUDGE BARNES: This includes sales data?

MR. WADE: A couple of the later ones will. Some of the numbers in 77 are not public, I am advised. On 78 some of the comments by BOC personnel concerning their views and plans could be disruptive of Airco's competitive position whether there be an acquisition or whether there not be an acquisition.

Therefore, we would request that those two documents be treated in camera.

JUDGE BARNES: I believe these are the first two in camera documents that have been presented.

MR. WADE: That is right.

JUDGE BARNES: Is there any objection to in camera handling of these exhibits?

MR. YOUNGWOOD: We have no objection.

JUDGE BARNES: How long a period of time do you think these should be kept in camera? We are requested by the Commission to set a time limit on in camera treatment of documents -- two years, three years?

MR. WADE: I think that that is something we can address ourselves to -- frankly, I had not thought about that problem and would like to consider them. As far as 77 is concerned, I would think two years would be fine, but as far as 77 is concerned, I think he British rule is 50 years.

JUDGE BARNES: I will receive Commission Exhibits 77 A and B and 78 A through D in evidence in camera, and I will ask tomorrow, Mr. Wade, that you give me some time period under five years or not over five years certainly. I will enter a written order as to these documents. The Commission has had problems. Copies of in camera documents have been given out by mistake, so they have asked us to give an order on such documents. Tomorrow perhaps I could enter an order covering all of the documents.

MR. WADE: That would be fine with us. I think there are a couple more we might request be handled accordingly.

MR. TOPKIS: I have not addressed my attention to these documents that I have agreed should come into evidence today with an eye as to whether they contain any extraordinarily confidential matter. I do not have the competence to do so. My friends from BOC will have to advise me and I have not had an opportunity to consult with them.

I would ask complaint counsel for the moment to treat these in confidence and I will be able to advise them and Your Honor tomorrow or the next day whether I will request in camera treatment of any of them. I would ask your indulgence so I can check that.

JUDGE BARNES: Maybe we can get to those tomorrow afternoon. I will ask the reporter to leave these documents with me. I will receive 78 A and B in camera.

(The document referred to, heretofore marked for identification as Commission Exhibit 78 A-B (in camera) was received in evidence.)

JUDGE BARNES: You have 76 now, Mr. Youngwood.

MR. YOUNGWOOD: I was under the impression we had introduced that.

MR. WADE: So was I. I think it is.

MR. TOPKIS: At least we have no objection to it.

JUDGE BARNES: Is there any objection to it?

MR. WADE: No objection.

JUDGE BARNES: I will receive Commission Exhibit 76 A through N in evidence.

(The document referred to, heretofore marked for identification as Commission Exhibit 76 A-N was received in evidence.)

MR. YOUNGWOOD: I think there were no objections to CX 79 and 80, and I would, therefore, request that CX 79 and 80 be received in evidence.

MR. TOPKIS: No objection from us.

MR. WADE: None from us.

JUDGE BARNES: I will receive Commission Exhibits 79 A through C and 80 A through C in evidence.

(The documents referred to, heretofore marked for identification as Commission Exhibits 79 A-C and 80 A-C were received in evidence.)

MR. YOUNGWOOD: My records indicate Mr. Topkis raised objection to Exhibits 81 and 82 and I would ask him to repeat the nature of his objections.

MR. TOPKIS: Certainly.

Exhibit 81, if I may address myself first to that, is a letter from Mr. Frasier Swetland of Frasier Swetland Incorporated, to various BOC people dated July 4, 1973. It relates to Airco. Mr. Swetland was at the time connected with a company which was a subsidiary of ours, but the statements that he there makes it seems to me, may not be received for proof of their truty.

I would have no objection to their receipt for non hearsay purposes. These facts were reported to BOC, but whether they are tru or not, I have no idea.

MR. WADE: We join in that objection. There are some statements made which, frankly, we think are not true.

MR. YOUNGWOOD: I have difficulty determining which BOC documents display the truth. Documents which are written by BOC employees and officials are stated not necessary to contain the truth. What BOC documents can we deem as being true other than those which relate to the very matter at hand.

We have asked for all documents relating to any number of different items in our subpoena. This document was prepared by a BOC -- actually it is an officer of a wholly-owned subsidiary of BOC. I don't see why we cannot take statements in it to be the truth.

JUDGE BARNES: Let's go to page 2, Mr. Youngwood, and ask you how should I receive this particular sentence, "Ohio Medical has between 60 and 70 percent of the anesthetic market in the U.S."

Do you want me to find that as a fact?

MR. YOUNGWOOD: I want you to find that that was BOC's belief at thatpoint in time?

MR. TOPKIS: It is certainly true that that was the view of Frasier Swetland at the time and we admit Mr. Swetland was telling the truth. If my friend wants to believe what they said, that is what they say.

JUDGE BARNES: I can't receive this as proving Ohio Medical had between 60 and 70 percent particularly if I have sales figures which show 40 percent.

MR. THURMAN: This is an admission by BOC. Who is going to speak for BOC. There is no difference from that man sitting on the stand and stating that. Then they can cross-examine and refute that in their defense. They have an opportunity to defend against. They can show they are not accurate. That is why you put on a defense. This is official and they are speaking for BOC, and certainly it is as reliable as it possibly can be.

MR. WADE: I cannot agree with that at all. If Mr. Swetland were on the stand and made that statement, I could ask him the source of that information and he could say gossip, hearsay and everyting else.

MR. THURMAN: It is in their files and the regular course of business.

JUDGE BARNES: This is a document they received and it was circulated to several officials shown here and used in the ordinary course of their business.

MR. THURMAN: You said received by officials -- written by officials?

JUDGE BARNES: Written and received by officials. That does not necessarily make the words in here the truth.

MR. THURMAN: It is admission by BOC. It is up to them in their defense to show this. They are in a better position to refute it.

JUDGE BARNES: It is an admission they received the information.

MR. THURMAN: It is admission they rely on it. It is in their files and they are in a position to refute that, not complaint counsel. We recieved it from the subpoena.

JUDGE BARNES: I will receive Commission Exhibit 81 A through Z in evidence.

EX

(The document referred to, heretofore marked for identification as Commission Exhibit 81 A-Z, was received in evidence.)

MR. WADE: Our objections are now noted?

JUDGE BARNES: Yes, they are.

MR. YOUNGWOOD: CX-82 to which Mr. Topkis has objected, is a document which was furnished in response to a specific specification of a subpoena. I presume we can rely on the truty of the information furnished to us. We asked for the true sales of BOC to Harris Lake.

I presume that this information was furnished and I presume we can rely on it?

MR. TOPKIS: If Your Honor please, there is no dispute about the facts. My only concern is that this document is far less formal than a document we supply and had verified pursuant to request from our friends. They have that document. That has the double, triple-checked figures. I would rather go with that which has the full story, than this little smidgen. For all I know, these figures are right, but we have more reliable information.

JUDGE BARNES: Are the other figures in dollars or pounds?

MR. TOPKIS: I don't really know. If I can check, I will advise the Court.

MR. YOUNGWOOD: Your Honor, we have just received a short time ago the other document to which Mr. Topkis refers. We do not have it with us at this moment in time. It is quite difficult for us to state that this is or is not reflective of the information given to us.

If we may, we will withhold the introduction into evidence at this point in time.

JUDGE BARNES: I think that is the best procedure to follow.

I suggest that we adjourn at this time and meet again tomorrow at 9:30.

MR. TOPKIS: Your Honor, as to one of the witnesses tomorrow, Your Honor will recall there was delivered to us yesterday a document partly in English and partly in French. I gather that is going to be offered on the testimony of one of these witnesses tomorrow.

We have not as yet been given a translation of the portion. And I trust my own French to translate it.

MR. THURMAN: Your Honor, we have a lawsuit pursuing a method to interpret that today. I told them I needed it tomorrow morning. She has some French. I don't know if she would qualify in Mr. Topkis's eyes or not. He is trying to get some official interpreter today to interpret it. At least we have her interpretation of it. I can give that to you before the end of the day.

MR. TOPKIS: If you could, I would appreciate that.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 4:25 p.m., the hearing recessed, to reconvene at 9:30 a.m., Wednesday, May 8, 1974.)

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or:hm

BEFORE THE

FEDERAL TRADE COMMISSION

IN THE MATTER

of

BRITISH OXYGEN COMPANY, LTD.,
BOC FINANCIAL CORPORATION,
BOC HOLDINGS, LTD.,
BRITISH OXYGEN INVESTMENTS, LTD.,
AIRCO, INC.

Docket No. 8955

Room 7314, The Star Building
414 Eleventh Street, N.W.
Washington, D.C.
Wednesday, May 8, 1974

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

ERNEST G. BARNES, Presiding Administrative Law Judge

APPEARANCES:

K KEITH THURMAN, GORDON YOUNGWOOD, DON PURCELL, DARYL NICKEL, RHETT KRULLA and JOHN HOAGLAND, on behalf of the Federal Trade Commission

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison, 345 Park Avenue, New York, New York, 10022, on behalf of Respondent, British Oxygen Company, Ltd.

GEORGE J. WADE, R. BRUCE MacWHORTER and DANFORTH NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York, 10005, on behalf of respondent AIRCO, INC.

ROBERT N. SAYLER and HENRY SAYLER, Covington & Burling, 888 16th Street, N.W., Washington, D.C., on behalf of Respondent Air Products & Chemicals, Inc.

JACK HEAGY, Counsel on behalf of Respondent, Air Products, R.D. #2, Allentown, Pennsylvania

APPEARANCES:

E.A. DOMINIANNI and J.M. RHODES, Coudert Bros., 200 Park Avenue, New York, New York, 10017 representing William Dempster

JORDAN C. BAND, Ulmer, Berne, Laronge, Glickman & Curtis, Keith Building, Cleveland, Ohio, 44115, representing S. Michael Loveman.

PROCEEDINGS

JUDGE BARNES: On the record.

MR. WADE: I would like to make one statement for the record.

I think the exhibit list in the front page of yesterday's transcript is not accurate. Mr. Topkis, Mr. Thurman and I can work out an accurate exhibit list as to when they were received, rejected or withdrawn. As it now appears in the record, it is not accurate.

MR. BROWN: I am not sure what the Commission's policy is on this, but we would like to obtain copies of what exhibits we can, subject of course to any objections on confidentiality grounds. I am not interested in challenging someone's confidentiality. But if you have no objection, we would like to be on record of requesting copies of the exhibits to the extent we are permitted to obtain them.

JUDGE BARNES: The exhibits that were received yesterday in the public record we are going to have to determine today whether or not any of them are going to be placed in camera. Until we make that determination today, they will not be public.

After today those that are received in the public record will be available for copying, but I don't know how you are going to get copies. The reporter cannot give you copies. It may be as much as ten days before Docket Section gets them.

MR. BROWN: That is all right.

MR. TOPKIS: May I inquire as to your preferred course of handling transcript corrections?

JUDGE BARNES: We usually wait until the proceeding is over, but if the cover page on the receipt of exhibits is incorrect, I think we might change that.

MR. TOPKIS: We will work it out among ourselves.

JUDGE BARNES: But only those of substance.

The reporter would like to know if there were major spelling errors, company names or things like that that they can have corrected now instead of perpetrating throughout the transcript.

MR. TOPKIS: I referred to McLouth is the correct spelling. It came out some other way.

MR. WADE: I don't have any at this time, but as we proceed, we will tell the reporter.

MR. BROWN: For your information, I want to introduce Miss Lenhart from our office who is a legal assistant with my firm who will be attending these hearings by herself or with one of us from time to time and I just wanted to identify her.

MR. THURMAN: Complaint counsel calls as its next witness, r. William Dempster.

WILLIAM E. DEMPSTER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

MR. THURMAN: Mr. Dempster is represented by legal counsel. Do you desire to make an appearance?

MR. DOMINIANNI: I am E.A. Dominianni and this is Mr. Rhodes. We represent Liquid Air. Good morning, your Honor.

DIRECT EXAMINATION

By Mr. Thurman:

Q Would you please state your name and home address.

A William Dempster, 1925 Gough Street in San Francisco

Q Are you employed?

A Yes -- I think.

Q By whom?

A By Liquid Air, Inc. I am president of Liquid Air, Inc.

Q How long have you been president of Liquid Air, Inc.?

A I guess we changed the name from American Cryogenics to Liquid Air, but I have been president of the American operations since December 20, 1968.

Q What are your duties and responsibilities as president of Liquid Air?

A In effect you can say I am president and operate very much in the area of general manager of operations and as such I am responsible for the profitability and expansion plans of the company. It takes me into particularly the area of sales and marketing and, of course, capital expenditures and operating expenses, organization.

Q How long have you been employed by Liquid Air?

A I had 11-1/2 years in total in Canada with Canadian Liquid Air and then the last 5-1/2 years in the United States, which would be a total of 17 years.

Q What positions did you hold while you were employed by Canadian Liquid Air?

A Upon graduation, I was in engineering school, I was an applications engineer at various locations for some five years. Then I had left the company for a period of 11 years and returned as manager in 1962, as manager of industrial gasses in the marketing department. Then I was 2-1/2 years as a regional manager in one of the divisions. Then I returned to the corporate office in Montreal as vice president, marketing, a position I held for a year, and then I became vice president of operations until the time I came to Atlanta, Georgia, when we started operations in the United States.

Q What were your duties and responsibilities as vice president of Canadian Air Liquide?

A Again, I was involved very much as general manager of operations, all operating areas except the actual accounting and financing, although the computer and data process was under my area.

Q What were your duties and responsibilities as vice

vice president, marketing, when you were with Canadian Liquidair?

A It is more or less as it implies, in marketing from the region of Newfoundland and Vancouver, normal sales operations.

Q Were you in charge of marketing industrial gasses?

A It is integrated. It would be industrial gasses and welding products combined.

Q What were your duties and responsibilities as regional manager when you were with Canadian Liquid Air?

A The concept of a regional manager is an arm of the head office management in terms of the overall profitability of a region. Again, the main point of a regional manager within that organization was maintaing sales, personnel and of course all of the operating expenses entailed in doing business.

Q In 1962 you managed the industrial gas market.

A Right.

Q Were the duties what that name implies?

A Right.

Q What is the business of U.S. operation of Liquidair?

A Our basic investment is in the air separation plants and, hence, our main attention is to the industrial gas business. That is, we have some 75 branch operations throughout the country. We have a high content of welding products that we also market.

Of course, we are manufacturers of the industrial gasses to a large extent and we act as distributor in terms of welding products.

Q Are you familiar with the term "industrial gasses"?

A Yes.

Q What does this term mean to you?

A I had to look that up before I came here in terms of I think the Department of Commerce classification whereby each product is classified with an SIC code number, so I would say anything beloning to Code 2813 would officially be industrial gas market, although we do market and sell gasses that are not within the classification, but is it not a large part of our business, and I don't think the industry as a whole.

I don't think propane or fuel gasses are included in the classification, nor do I believe some refrigerant gasses would be included.

Q What portion of Liquid Air's business you just stated not in 2813 account for?

A That are not in it?

Q Yes.

A I really could not say, but I would think it must be less than two percent, but that is a wild guess.

Are you referring to our company now?

Q Yes.

hm A It would not be half a percent.

by Q Less than half a percent.

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MR. WADE: Coul I have the question read back, please.

(Question was read by the reporter.)

JUDGE BARNES: Your answer is less than half a percent.

THE WITNESS: Propane and fuel gasses are not a part of our business. They are very small.

By Mr. Thurman:

Q When you answered less than 2 percent, are you referring to the entire market?

A Let's say that portion handled by the industrial gas companies. Obviously propane is a big product item but I think its main sales are probably done outside of the companies I had referred to in the compressed gas industry.

Q What industrial gasses are derived from air separation?

A Practically speaking, oxygen, nitrogen and argon. As far as we are concerned that is the extent. There are traces of krypton and xenon which we do not sell ourselves.

Q What percentage of the total value of U. S. industrial gas shipments by Liquid Air is represented by the gasses derived from air separation?

MR. TOPKIS: Is that in terms of dollars or volume?

MR. THURMAN: I said value. I think that means dollars.

THE WITNESS: I don't know if I have your question right. Are you asking what percentage of our air separation products, our company's sales?

JUDGE BARNES: On a dollar basis.

By Mr. Thurman:

Q Of the industrial gases.

A I believe around 70 percent.

Q Mr. Dempster, in 1972 what was the value of Liquid Air's industrial gas shipments in the United States including Gulf and Dye on a pro forma basis?

MR. TOPKIS: Including what?

MR. THURMAN: Gulf and Dye.

MR. TOPKIS: On a pro forma basis?

THE WITNESS: Do you meand inasmuch as we had not acquired Gulf and Dye in 1972. It is about $33.5 million and this excludes anything like cylinder demurrage or cylinder rental.

By Mr. Thurman:

Q In 1973, what companies produced and distributed industrial gasses in the United States?

A Linde, and of course many of their dealers in terms of acetylene plants, Air Reduction Company -- the same thing would apply to dealers, Air Products, Chemetron.

Q Are you talking about dealers producing?

A You said industrial gasses?

Q Yes.

A they produce acetylene. If you are talking air separation plants they would be different.

Q I am sorry. I interrupted you. Continue, please.

A Big Three, Liquid Carbonic Corporation, Burdett, Alabama, Burdett of Norristown. I think I must have the major ones there. If I left somebody out, I would have to have it read back -- and ourselves.

Q You mentioned Burdett of Cleveland.

A I believe I mentioned Burdett of Cleveland.

Q Are there two Burdetts?

A I think it is referred to as Burdett of Norristown, yes.

Q Is National Welders Supply Company a producer?

A Yes, I believe they have a venture with Burdett of Norristown.

Q How about Northern Gasses and Supply?

A As a producer, they have a capital plant. We are not in the Northeast operations. I amnot too familiar with them.

Q Are you familiar with Pacific Oxygen?

A Yes, in the Bay Area in San Francisco, right, and Solox?

Q Are you familiar with Southern Cryogenics?

A I know of them.

Q Do you know if they are a producer?

A Yes, I believe they are a producer.

Q Mr. Dempster, when did Liquid Air enter the United States industrial gasses market?

A I guess officially it was December 20, 1968, although we had the management of the American Cryogenic Company in October prior to the finalizing of the agreement for acquiring a partial interest in American Cryogenics from Standard Oil of New Jersey.

Q How did Liquid Air enter the U. S. industrial gasses market?

A How?

Q By what method did you enter it? How did you get in this market?

A As I said, we acquired a partial interest in American Cryogenics from Standard Oil of New Jersey.

MR. NOPKIS: I didn't hear the witness's last few words.

JUDGE BARNES: From Standard Oil of New Jersey.

By Mr. Thurman:

Q Do you still have a partial interest?

A This was Canadian Liquid Air that acquired a portion interest. Today we are part of a holding company of Liquid Air of North America and as such we have 100 percent.

Q What was the business of American Cryogenics?

A The value of the industrial gases and welding supplies was around $20 million.

MR. TOPKIS: I am sorry, I am having difficulty hearing the witness.

Could I have the question and answer read back please.

(Question and Answer were read.)

JUDGE BARNES: Did Standard Oil retain a partial interest?

THE WITNESS: Right.

By Mr. Thurman:

Q Were you aware of the performance of American Cryogenics when it was owned entirely by Standard Oil of New Jersey?

A Yes.

Q What was its performance?

MR. TOPKIS: Objection.

That question calls for the writing of a book.

JUDGE BARNES: Let us limit it in some fashion. Performance is rather broad.

By Mr. Thurman:

Q What was the condition of the company at the time Liquid Air got an interest?

MR. TOPKIS: Objection.

MR. WADE: Objection.

JUDGE BARNES: Financial condition?

MR. THURMAN: Financial.

MR. TOPKIS: That can be gotten from a financial statement.

JUDGE BARNES: Do you have that knowledge when the company has been acquired?

THE WITNESS: I think it has been published in a prospectus we put out. The company was loosing a substantial amount of money in its operations.

MR. TOPKIS: I didn't hear the answer.

THE WITNESS: The company was loosing a substantial amount of money as a percentage of its sales.

MR. TOPKIS: I mean no disrespect to Mr. Dempster but that is the kind of answer that does not help us very much.

Did you say it was in a prospectus? Did you say in a red herring prospectus?

MR. THURMAN: I object. He has a right to cross examination.

All through this trial Mr. Topkis has been cross examining the witness on direct examination. If he has an objection let him state it and research his questions for cross?

JUDGE BARNES: This is a rather general answer and his ability to explore it by cross examination is rather limited. If there was a prospectus issued it seems to me we could get a copy of it. SEC must still have it on file even if the company doesn't.

MR. THURMAN: I would submit this witness is entirely capable of giving reliable testimony as to when his company which he participated in acquired the company. Certainly Mr. Topkis knows and everyone knows you look into the condition of the company before you acquire an interest and certainly this is entirely reliable evidence.

JUDGE BARNES: His testimony is in the record.

MR. THURMAN: I submit that a red herring prospectus is not as reliable as the testimony of an expert opinion of a witness who participated in acquiring the company.

JUDGE BARNES: You submit what you please, Mr. Thurman, but if it was filed with the SEC I assume it was accurate.

MR. THURMAN: It does not give the complete information that the witness just testified to.

THE WITNESS: I answered very briefly.

By Mr. Thurman:

Q Would you answer very briefly.

A The company lost money in 1968 and wind up of 1968 had a loss of approximately $4 million on sales of about $20 million.

MR. TOPKIS: Your Honor, so there may be no uncertainty, I do not have a copy of that red herring whatever it may be. We would like to have a copy. If Commission Counsel has a copy, we would welcome being supplied with it.

JUDGE BARNES: Do you have a copy, Mr. Youngwood?

MR. YOUNGWOOD: Your Honor, I don't recall at this time.

JUDGE BARNES: You don't recall.

MR. THURMAN: We had no intention of using it.

JUDGE BARNES: The question is, do you have a copy?

MR. THURMAN: I don't know. I have not seen a copy.

JUDGE BARNES: Have you seen a copy, Mr. Youngwood?

MR. YOUNGWOOD: I am telling you I honestly do not recall whether we have a copy or whether we have seen a copy of that particular prospectus.

As Mr. Topkis said, it might be on file with the SEC. I just do not recall if we have seen a copy.

MR. TOPKIS: Could we have identified on the record at this point what company it is a red herring prospectus of. It might be American Cryogenics, or Standard Oil of New Jersey.

THE WITNESS: It is Liquid Air of North American.

MR. THURMAN: Mr. Topkis; can introduce this.

JUDGE BARNES: Perhaps this is why he is inquiring about more identification of the prospectus.

MR. THURMAN: He can find that out as well as we can.

JUDGE BARNES: Let's proceed.

MR. YOUNGWOOD: I have been told we do have a copy. I think I may have misunderstood your question.

We do have a copy of a prospectus issued by Liquid Air dated May 1, 1973. Is this the prospectus to which --

THE WITNESS: There are a number of different dates.

MR. YOUNGWOOD: I don't know if that is the prospectus to which Mr. Dempster referred. We do have a copy of that prospectus.

JUDGE BARNES: Let's see if the witness can identify it for us.

MR. THURMAN: Respectfully, your Honor, I would not want to use this on defense, and I don't know there is anything in there that is of value.

JUDGE BARNES: Is this the prospectus to which you referring, Mr. Dempster?

THE WITNESS: Yes. There are various dates. I guess it goes right through from May to October.

JUDGE BARNES: This 1973. I thought you were speaking of 1968?

THE WITNESS: There is just mention of the financial condition of American Cryogenics at the start of our operations that is published in there. I just mentioned, made reference to the fact that the financial situation of American Cryogenics was made public through a statement in there.

It says it was losing $4 million.

JUDGE BARNES: Do you have any objection to giving this to Mr. Topkis for cross examination?

MR. TOPKIS: I may have a copy of it. I thought we were talking about a 1968 document. If I can see the one supplied to your Honor, I can tell whether we have it.

No, we do not have it.

May I show it to Mr. Wade?

JUDGE BARNES: Yes.

THE WITNESS: There were just different revision dates.

MR. TOPKIS: If we could have an opportunity to look at this --

JUDGE BARNES: For cross examination purposes.

MR. THURMAN: We will introduce this. I will mark it right now and introduce it into evidence.

JUDGE BARNES: We don't have to do it for that reason alone.

MR. THURMAN: If he is going to make an issue out of it, I would just as soon introduce it.

MR. WADE: We merely wanted to see a copy of what was referred to.

Now that we have seen a copy of it that is fine. I don't see any reason to carry it on any further.

MR. KRULIA: Your Honor, shall we have copies made at this point in time?

JUDGE BARNES: Not at this time.

MR. THURMAN: We will offer it into evidence. If they think this is the best evidence I will be glad to let them have it.

MR. KRULIA: Commission Exhibit 305, the subletters for individual pages not yet having been indicated. They will be done later today.

MR. TOPKIS: May I reserve comment on it until I have had a chance to look at it?

JUDGE BARNES: I will reserve ruling until Respondent's counsel have had a chance to look at the document.

Let's proceed now and we can come back to the exhibit later.

By Mr. Thurman:

Q Mr. Dempster, did Liquid Air turn this company around?

MR. TOPKIS: Objection.

JUDGE BARNES: Rephrase your question.

By Mr. Thurman:

Q What was the financial condition of American Cryogenics after Liquid Air obtained full ownership?

MR. WADE: Objection -- time period.

JUDGE BARNES: In what year did they obtain full ownership?

THE WITNESS: By September 1969.

JUDGE BARNES: As of that date, what was the operating condition of the company?

THE WITNESS: The company was still losing a substantial amount of money. I really could not recollect exactly how much but it had not been that much improvement in a period of nine months. But in the period of the next three years, with the integration of the Northwest operations of Industrial Air Products, the company was completely turned around into the black condition until today, 1973, the identity of American Cryogenics is mixed with the company.

It is hard to isolate it as such but the company today is from a $4 million loss ~~of~~ on $20 million sales as grown to $80 million with a profitability of 5.9 percent after tax.

By Mr. Thurman:

Q What did Liquid Air do to turn this company around?

A I guess it was a matter of applying all the management principles you see in the book but selected marketing approach and reorganization of manpower to get a higher productivity, almost a double productivity from that which was there at the beginning.

During the three-year period from 1969 it was a question of the company handling about 30 percent more sales with 30 percent less manpower.

With that approach it was management and productivity improvement.

Q Did management expertise in Industrial Gas have anything to do with turning this company around?

A I think a lot of the management could apply to any industry but certainly a knowledge of the make-up of the business and customer contribution to profit was pretty important.

Q Did Standard Oil of New Jersey have this expertise?

MR. TOPKIS: Objection. This man is not a qualified expert on Standard Oil of New Jersey which I have not heard demonstrated up to now.

MR. THURMAN: Mr. Topkis is losing sight of the fact they acquired this company from Standard of New Jersey and maintained an interest in their operation and he would have some knowledge of their management's ability so I think he is qualified to answer.

JUDGE BARNES: Ask him if they did at the time they possessed the company.

THE WITNESS: Their expertise was not in this field. That is the people they had there did not have it.

By Mr. Thurman:

Q Subsequent to the acquisition of American Cryogenics by Liquid Air or Canadian Liquid Air, has Liquid Air expanded its operation in the industrial gasses field or market in the United States?

A Not so much by geography but by increased production facilities.

We made a new acetylene plant in Houston and we built a separation plant in Seattle-Takoma area and we also built a new acetylene plant in the Los Angeles area.

We are expanding in our production capabilities in Alaska and in Phoenix, Arizona, and underway is a new plant in Spartanburg, for the Carolina area.

Q Subsequent to the acquisition of American Cryogenics, did Liquid Air expand its business in any other manner?

A Subsequent to American Cryogenics, yes, we acquired Industrial Air Products with headquarters in Portland, Oregon.

JUDGE BARNES: What year?

THE WITNESS: 1969. Then effectively at the beginning of 1973 the operations of Gulf Oxygen headquartered in Lake Charles, Louisiana, and in Dye Oxygen in Phoenix, Arizona.

By Mr. Thurman:

Q Did you state the time of the Gulf and Dye acquisitions?

A Just at the end of 1972 and the beginning of 1973. Effectively we had a twelve-month operation in 1973.

Q Was Industrial Air Products involved in producing and marketing industrial gasses in the United States?

A Yes, right.

Q What area did they operate?

A They operated in Washington, Idaho, Montana, Utah, Northern California, Alaska.

JUDGE BARNES: What were their sales in 1969 when you acquired it?

THE WITNESS: $18 million, I believe.

By Mr. Thurman:

Q What was the size in dollar value of industrial gases?

A I would say probably it must have been about 43 percent of the total.

Q Was Gulf Oxygen involved in the production and distribution of industrial gasses at the time of the acquisition?

A Yes, they had a plant at Lake Charles, Louisiana. They had a liquid plant and a gaseous plant for pipeline supply to an adjacent chemical company.

Q What was the size of Gulf at the time of the acquisition in sales?

A In the order of $10 million.

Q Do you know what percentage that would be accounted for by sales of industrial gasses?

A Yes, it would be less than 30 percent. They were heavy in their welding products.

Q Where did they market?

A They marketed throughout Louisiana, in Beaumont, Texas and in Houston, Texas.

Q Was Dye Oxygen involved in the production and distribution of industrial gasses at the time of the acquisition?

A Right.

Q What was the size of Dye?

A Dye was also on the order of $10 million.

Q What percentage of that $10 million was accounted for by the sale of industrial gasses?

A Industrial gasses in this case were closer to 60 percent.

Q Where did Dye operate at the time?

A Throughout Arizona, parts of New Mexico, Las Vegas, Nevada; in the Los Angeles area, and in Houston, Texas.

Q Mr. Dempster, I show you Commission Exhibit 297-A through Z-25 for identification.

Would you tell me what this document is?

A Yes, this is sort of a working paper or plan that was written in the summer of 1968 which sort of outlined from a business point of view the plan that we had with Standard Oil of New Jersey to acquire ultimately up to 51 percent of the company-based on profit performance checks over a period of eight years.

Q Did you participate in the preparation of this document?

A I did.

MR. HOPKIS: Wait a minute.

Could we have the question finished and then the answer. The question was, did the witness participate in the preparation of the document?

THE WITNESS: I participated in the preparation of parts of the document particularly from the operating point of view and the marketing possible acquisitions.

By Mr. Thurman:

Q Are you familiar with the complete document?

A Not completely on the financial side but I have a good working knowledge of it, I believe.

Q In your opinion is the facts actual that appear in this document?

MR. HOPKIS: I don't understand that question. I object.

MR. THURMAN: Does he believe this to be an accurate reflection of the facts delineated in the document?

THE WITNESS: I believe for the most part but I think obviously from this working paper by December 20 all this was written in a legal document probably that thick, and I think the business principles still apply, but this basically was the principle of the scheme.

By Mr. Thurman:

Q CX-297-Z-20 through CX-297-Z-25 is an interpretation of the French language appearing in the document.

MR. TOPKIS: I am missing some copies of this document which counsel was good enough to supply it. Everything is missing from Z-18 on unless this translation I have been given fills in the gap but counsel just said that is five pages.

MR. WADE: The last page we have is Z-17.

JUDGE BARNES: That is the last page I have.

MR. KRULIA: Original document CX-97-A-1 and -2 were cover sheets which we identified after initially copying and numbering the document.

In accordance with your Honor's instructions of last Monday, this morning I identified this problem in numbering and put those two cover sheets at the back end. They don't substantially add to the document but they now constitute CX-297-Z18 and CX-297-Z-19.

JUDGE BARNES: Did you give Respondent's copies of those last two pages?

MR. TOPKIS: We had copies. They just had to be renumbered.

MR. KRULIA: Z-20 through Z-25 the translation pages with which your Honor and Respondents were provided copies yesterday, unnumbered copies.

MR. THURMAN: Complaint Counsel offers CX-297-A through Z-25 for identification to be received in evidence.

MR. TOPKIS: I object, your Honor.

JUDGE BARNES: What is the purpose of the offer, Mr. Thurman? What do you offer it to show?

MR. THURMAN: We are offering it to show at the time of the acquisition of American Cryogenics what the negotiations were, how Liquid Air would get into this market, what they felt the conditions of the market was at this time and the available companies for acquisition.

JUDGE BARNES: I notice in the example on page CX-297-N there are earnings per share, cash flow, price earnings ratio of other companies.

Do you offer this for the truth of those statements or is this merely offered to show the studies that Liquid Air realied upon at the time?

MR. THURMAN: This is an offer to show this is what Liquid Air thought these other companies were doing at the time and relied upon at that time.

JUDGE BARNES: Any objection?

MR. TOPKIS: Yes, sir, I object to every part of the document. The first three pages are in French. We have been supplied a confessedly inexpert translation of that. I share in the judgment that it is inexpert. I would not mind an expert translation being substituted and that would solve that much of a problem.

THE WITNESS: If I had known I would be here five years ago, I would have written it in English.

MR. TOPKIS: Second, the document contains all matters of asserted statements of fact and the author is not present in the court room.

If I may ask the witness two questions on voir dire I can demonstrate this.

VOIR DIRE

XXXX By Mr. Topkis:

Q Did you write this?

A No, sir.

Q It was written --

A In collaboration with Mike Breber and Pierre Salbaing.

MR. TOPKIS: Neither of these gentlemen is in the court room so I can't cross examine them.

Going on, the document has more French at pages E, F, G -- in my copy at least the pagination is out of whack.

Page L seems to be identical with another page or maybe there are just two page L's -- no there is a page J and a page L that are identical.

Beyond these are all manner of projections -- I think they are projections on page M. I can't cross examine whoever prepared the projection.

On page N there are, as your Honor will note, various apparent estimates as to cash flows and earnings per share of various companies which I have no way of testing whether they are accurate or inaccurate and what the relevance of 1968 might be in 1973 rather escapes me.

Then we have the same problem over on page O, more porjections, and P, more projections, and then coming over to page T we have a summary of possible acquisitions which goes on for some pages, what look to be distributors in the welding and gases field who might be acquired by whom, for how much, I have no idea, what basis this list was assembled on I have no idea.

At one page over on Z-1 there is an indication down in a footnote that three X's means interesting and easy to buy out and double X means interesting and average to buy out and single X means hard to buy out.

MR. THURMAN: I don't think Mr. Topkis needs to read what is in document. He can be precise.

MR. TOPKIS: I think I am being damn precise. Over on page 5 seems to be more projections of possible tonnage construction for somebody. I really don't know who prepared it, what kind of tonnage production, where.

The same thing goes on for pages -- more forecasts.

Then over on Z-10 we have, I take it, some projections of Canadian Liquid Air's balance sheet through the year 1976.

The same thing goes on for more pages.

Then we come to miscellaneous depreciations, it looks like. More forecasts, by whom, of what, I don't know.

Then on Z-17 -- I don't think these are projections but they are in French and no translation has been furnished so I am not quite sure what they are.

On the individual basis mentioned, I think the various component parts of this document are objectionable and in some, I can't see that the whole document has anything to do with this case.

I take it that there were some negotiations between Mr. Dempster's company and Jersey Standard which resulted in the purchase by his company, first, of an interest in American Cryogenics and then the balance.

If Complaint Counsel want to produce the contracts which accomplished those two purchases, perhaps they might have some relevance. But these various mysterious other things I think have no pertinence here and are grossly incompetent.

MR. WADE: May I have two questions on voir dire?

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VOIR DIRE

By Mr. Wade:

Q You testified you were primarily an operating officer for your company primarily responsible for the operating functions.

A That is my main function.

Q When your company purchased American Cryogenics were you mainly responsible for the negotiations with Standard Oil of New Jersey?

A No.

Q Who was?

A I would say Mr. Breber, Mr. Salbaing.

MR. WADE: The first thing Mr. Thurman offered this for was what negotiations were with New Jersey Standard if I quote him correctly. The document was apparently prepared by Mr. Breber and Mr. Salbaing.

This might explain some of the French in it. I don't think this document can be subject to cross examination by this witness. I think it would require those other two gentlemen in order to testify and tell us exactly what this means.

For instance, on Z-5, the entire list of numbers is followed by the following: "Note, probably true for first plant, probably pessimistic for following ones."

There are all sorts of judgments in here, business, financial, not only of this company but of everything else.

It is totally irrelevant. But he is not the author so it is totally irrelevant so I join in Mr. Topkis' objections and support his objections.

MR. THURMAN: I appreciate Mr. Topkis's fine presentation of what that document contains but I am not sure of his objections.

Mr. Topkis is still trying to perform the functions of Complaint Counsel. We will decide what we will offer and we don't need suggestions from defense counsel.

Secondly, this document was received from Mr. Dempster. He testified he participated in the preparation of some of the items in this document. It is placed in the business records and falls in under the exception normal course of business.

Certainly there is no objection to the authenticity of this document. Therefore, for the purposes that Complaint Counsel wants to put this in to show what was in their mind, why they felt they should get into this market, an approved market, who they thought was available for acquisition and what they expected to do with this company certainly deals with this case and is certainly admissible for those purposes.

JUDGE BARNES: I don't see how the negotiations between Liquid Air and Standard Oil are relevant to this proceeding. The only relevant thing is the actual merger. We are not interested in the negotiations that went on between the two companies.

MR. THURMAN: I will withdraw the negotiations. The other purpose is what they felt the market would provide, would like to get into the market, and who they felt was available for acquisition and what they would do with this company.

JUDGE BARNES: I think you should use this document to question Mr. Dempster. I don't think the document itself is admissible. Liquid Air is not a Respondent in this proceeding. This is not a business exception to the rule. The document was not prepared by Mr. Dempster. If he used it you can ask him what parts he used and what parts he supervized and you can ask him what conclusions he drew about the market but I don't think this document is admissible in the form it is in.

If this were a document by AIRCO or BOC, it might be admissible but I don't think it is admissible since it is a document of a third party.

MR. THURMAN: It has nothing to do with AIRCO or BOC's activities itself. This represents the company. This man is the President of the American operation. He is the company.

JUDGE BARNES: Ask him what he did, what he thought about the market, what his projections for the market were, what possible companies he looked at for acquisition, how he intended to expand.

Those questions may be relevant but not this document.

MR. THURMAN: I think he has already stated he intended to expand.

One point, your Honor, on the interpretation. We will have the certified copy at noon from Berlitz and we will have that at noon and I assume this will go into the rejected file.

JUDGE BARNES: That is correct. I will reject CX-297-A through Z-25.

XXXX (The documents referred to marked for identification Commission Exhibits Nos. CX-297-A through Z-25 were rejected.)

MR. TOPKIS: May I see Z-20?

MR. DOMINIANNI: A rejected exhibit means other parties would not have access to this.

JUDGE BARNES: I am afraid it might be public.

MR. THURMAN: We would be willing to offer it for in camera treatment.

MR. DOMINIANNI: Since a rejected Exhibit is the same as an accepted exhibit, I would ask that it be given in camera treatment and not be made available to the general public since I note that some companies are interested in getting copies of all exhibits.

JUDGE BARNES: We will place it in an in camera status in the rejected file.

(The documents referred to marked for identification Commission Exhibits Nos. CX-297-A through Z-25 were rejected (in camera).)

MR. TOPKIS: What is Z-20?

MR. KRULIA: That is an unnumbered copy of what we provided you with yesterday.

MR. TOPKIS: I will check with Complaint Counsel later.

MR. THURMAN: It will be substituted for Berlitz' interpretation.

By Mr. Thurman:

Q Mr. Dempster, what was your projection for the industrial gas market at the time Liquid Air acquired American Cryogenics?

MR. TOPKIS: Objection. What difference does the man's projection in 1968 make to the case?

MR. THURMAN: It was at the time they acquired it -- what was the market at that time and what is it like presently?

JUDGE BARNES: I think it is relevant. I will permit you to answer that question.

THE WITNESS: We figured that the long-term growth would be at least 8 to 10 percent and on that basis -- first of all it was the largest market in the world and at those types of percentages applied to that market size made it a most attractive market indeed so we had a lot of confidence in this market.

JUDGE BARNES: That was in 1968?

THE WITNESS: Yes, at the time of this study.

By Mr. Thurman:

Q Has your 1968 prognosis come true?

MR. TOPKIS: I object to that, your Honor. There is another way than that of proving whether or not his prognosis has come true.

JUDGE BARNES: That is right. That was his prognosis in 1968.

By Mr. Thurman:

Q What is the market like today?

MR. TOPKIS: Objection, your Honor, with respect. Perhaps the witness's forecast for rate of growth is being called for and can be defined down to something like that --

JUDGE BARNES: Yes, rephrase your question, Mr. Thurman.

By Mr. Thurman:

Q Is this a growth market today?

A Yes, sir.

Q In your business judgment, Mr. Dempster, do you consider BOC in 1978 have the capability and expertise and interest of entering in the production and distribution of industrial gas U. S. market in a similar manner as to the entry made by Liquid Air in 1968?

MR. TOPKIS: Objection, your Honor.

JUDGE BARNES: What is the basis of your objection?

MR. TOPKIS: This witness could not possibly know BOC's interest without being a mind reader, and second calling on him to respond whether BOC has an interest in doing in 1974 what his company did in 1968 calls on him to perform an impossible judgment.

JUDGE BARNES: That is right. I think you should limit your question and not make it contingent upon what Liquid Air did.

Did BOC have the financial capability, technology and market expertise to enter this market in 1973, in your opinion?

THE WITNESS: Yes, I am sure they do.

By Mr. Thurman:

Q Industrial gases market in 1973 -- what was the balance between supply and demand?

A There was a shortage of air separation products particularly I would say in the Eastern United States. We probably felt it only by the first quarter of last year. Starting in the first quarter, since we don't operate in heavily industrialized Northeast maybe it did not hit us as early but starting in May of last year --

MR. TOPKIS: Could the witness keep his voice up.

Perhaps we could just have it read back.

JUDGE BARNES: Finish your answer.

THE WITNESS: Starting in May of last year the product shortage started to hurt us in our Eastern operations so I would say the last twelve months there has been a shortage.

JUDGE BARNES: Would you read the answer now, please.

(The answer was read by the reporter.

By Mr. Thurman:

Q What is the geographic marketing area of Liquid Air in the United States?

A It might be easier to answer where we are not. We are not to any significant part in the Northeast or Midwest. We do have very small operations -- Chicago, St. Louis, Detroit, Louisville.

Q What portions of the Midwest are you talking about that you are not in?

A We are not in right through, say, all the way out to Wyoming or Kansas, as well as the industrialized Northeast quadrant.

Q The upper Midwestern portion of the country?

A That is right. We are not in there. I said barring a small operation -- Chicago, Detroit, and the others I mentioned.

Q I understand you market nationwide other than the areas you stated?

A No, if you were to take it state by state there are a number of states that are not in.

Q Basically the areas you named just now are not in?

A Right.

Q Prior to BOCs acquisition of AIRCO stock, Mr. Dempster, did you receive any information where BOC considered acquiring any U. S. industrial producers and marketers?

MR. TOPKIS: I take it that calls for a yes or no answer.

JUDGE BARNES: I think so.

THE WITNESS: Including rumors, yes.

By Mr. Thurman:

Q What companies were these rumors?

MR. TOPKIS: Objection.

JUDGE BARNES: It would be hearsay.

Did you see any published information?

THE WITNESS: No, sir, no published information.

JUDGE BARNES: There was talk in the trade.

THE WITNESS: I would refer to it as talk in the trade of which there is much talk in the trade in our industry.

By Mr. Thurman:

Q What companies?

A Burdett.

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MR. TOPKIS: Objection.

JUDGE BARNES: You are going to have Burdett here as a witness. I will strike the answer.

THE WITNESS: As a rumor.

JUDGE BARNES: We will strike the testimony about the company.

MR. THURMAN: May I make a statement. We want to show that the industry had knowledge they were looking around, there were rumors. We want to show that members in the producing and marketing of industrial gases knew they were looking around, had some knowledge that they were looking around.

JUDGE BARNES: They heard talk in the trade they were looking around. The record is clear on that.

By Mr. Thurman:

Q Do you know if anybody else was looking around?

A No.

MR. THURMAN: May we have one minute. I believe we are through.

MR. DOMINIANNI: Since counsel is discussing something, may we have a two minute break for the witness?

JUDGE BARNES: Yes, we will take a ten-minute break.

(Whereupon, a short recess was taken.)

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JUDGE BARNES: On the record.

By Mr. Thurman:

Q One thing I missed, Mr. Demptster, when we were talking about American Cryogenics and the size of company and sales and you gave the total sales, at the time of the acquisition what was the sales of industrial gasses by American Cryogenics?

A It would be about $13.5 million.

Q 1972 -- I believe you gave the total industrial gasses sales in the United States for Liquid Air and Dye and Gulf on a pro forma basis. What were the total sales in 1972 of industrial gasses in the United States of Liquid Air without Dye and Gulf?

A In 1972?

Q Yes, sir.

A I think it was about $26.2 million.

MR. THURMAN: We have no further questions, Your Honor.

MR. TOPKIS: Your Honor, Mr. Kaplan will cross-examine Mr. Dempster.

MR. KAPLAN: First, may I call on complaint counsel to supply any Jencks material on this.

MR. THURMAN: I don't believe we have any Jencks statements. We have no interview reports.

JUDGE BARNES: Do you have any notes or tapes?

MR. THURMAN: We do have some notes, but no tapes. I have a set of scribbling notes by myself and some by Mr. Purcell in an interview with Mr. Dempster.

JUDGE BARNES: These seem to be shorthand attorney notes and they are not substantially verbatim statements of the witness, so I will not order these turned over.

MR. THURMAN: I may offer notes for your inspection of another meeting, with these handwritten notes of Mr. Purcell of a meeting with Mr. Dempster.

JUDGE BARNES: These seem to be of the same nature. They are attorney's notes and not verbatim statements.

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CROSS-EXAMINATION

By Mr. Kaplan:

Q Mr. Dempster, since your acquisition of Industrial Air Products and American Cryogenics the accounting and financial records for those companies have been kept on a consolidated basis; is that right?

A I take it by that you mean as an integrated operation where we don't allocate between the two, so the answer is "yes."

Q So you can't separate out today the respective performances of what used to be American Cryogenics from what used to be Industrial Air Products?

A No, we can't.

Q I suppose since you acquired Industrial Air Products, you have made some changes in the way in which it is operated, is that right?

A Right.

Q In fact, at the time you acquired Industrial Air Products, it had four air separation plants in the Portland, Oregon area, is that right?

A It had one plant complex made up of four units.

Q Are those plants still operating today?

A Two of them are and a third partly.

Q The third that is operating on a partial basis is operating at what proportion of the output that it was when you bought Industrial Air Products?

A I don't understand your question here.

Q Would you explain to us what you mean by one of the plants being operated today on a partial basis?

A For this market area we now have a new, much larger, lower cost operating unit in the SeaTac area, which has to be run at full capacity. So we have shut these down on a temporary basis.

?

Q So you have effected some economies in what used to be the Industrial Air Products area?

A The cost of building the plant, no economies, no.

Q Economies in the cost of operation?

A From the point of view of production?

Q That's right.

A No, sir.

Q Pardon?

A No.

Q In other words, it is now costing you as much to produce gas ---

A It is now costing us more because we have a new plant in there.

Q Putting aside the -- your unit cost of gas in the Seattle and Pacific Northwest area is higher or lower than it was when you bought Industrial Air Products?

A Higher.

Q Has the cost of power risen in that area since you bought Industrial Air Products?

A Yes.

Q By what proportion, if you know?

A I don't know off-hand, but I would guess it is off the order of 30 percent.

Q What prportion of the cost of air separation gasses is attributable to power?

A The operating expense outside of capital charge may be 55 percent, but the main cost, of course, is the capital charge of the plant investment, which is the reason why our costs are higher because we have a new $5 million plant.

Q Presumably you built your new plant in the Seattle area because you thought ultimately it would have a greater profitability of Liquid Air?

A There is a shortage of supply. We needed product.

Q You built your plant in the Seattle area because you thought it would have a greater contribution to the profitability of

Liquid Air than the facilities you closed down; is that correct?

A I can't give a simple answer to that question. If you are talking in the long-run, we needed more product. We were short of supplies, we had to build a plant.

Q You did not build that plant because you felt it would hurt the profitability of the company?

A It does on an interim basis.

Q Over the long term it would contribute?

A Of course.

Q There is no way or separating out the effect of that contribution from the older American Cryogenics' operation, is there?

A No, it is very difficult to allocate expenses.

Q At the time you bought Industrial Air Products, that company was a profitable operation, was it not?

A Right.

Q I believe you testified that the sales of American Cryogenics at the time you acquired it was about $20 million, is that right?

A That's right.

Q About $13.5 million of that was in industrial gasses?

A Right.

Q And the sales of industrial gas products was $18 million when you acquired it?

A Right.

Q What was the sales of Industrial Air Products in industrial gasses when you acquired it?

A I believe it was around 60 percent, which I believe is what I said -- of the order of 60 percent of $18 million.

Q About $10 million more or less?

A No, it is the other way around. They are heavier in their welding products. I think I said it was about 43 percent gas.

Q About $7 million more or less in the sales of gasses when you bought it?

A Right.

Q The sales of Dye Oxygen and Gulf Oxygen were both about $10 million each?

A Right.

Q How much of the sales of Dye, when you acquired it, was attributable to industrial gasses?

A I believe I said to the best of my recollection about 60 percent gasses.

Q Of Gulf?

A I said probably less than 30.

Q So that would be about $3 million more or less?

A What is 30 percent of 10?

JUDGE BARNES: $3 million.

THE WITNESS: Good for you.

By Mr. Kaplan:

Q Do you know of any companies in the United States today, apart from Union Carbide, Air Products, AIRCO and yourself, Chemetron, Big Three, Liquid Carbonic and Burdett of Cleveland with sales of industrial gasses as high as $10 million?

A Any others, I don't agree, no.

Q Do you know of sales higher than $5 million other than the companies I have accepted?

MR. THURMAN: Objection. There is no foundation laid that he knows.

JUDGE BARNES: He does not need a foundation for a question like that. What foundation is needed?

MR. THURMAN: How he knows the sales. I guess he can say, no, he does not know.

MR. KAPLAN: Could we have the question back please?

THE WITNESS: The fact that I say I don't know does not mean there are not any. I would believe National Welder's Supply would be over $5 million in industrial gasses, but I don't know.

By Mr. Kaplan:

Q Can you think of any others that are over $5 million?

A No. Of gas only?

Q Right.

A No.

Q So far as you know, are the sales of National Gasses over $10 million?

MR. THURMAN: Objection. This is beyond the scope of the direct. To use Mr. Topkis' words, witnesses will be called from these companies.

MR. KAPLAN: I will withdraw that question.

By Mr. Kaplan:

Q On direct I believe you testified that in designating industrial gasses you had consulted the Bureau of Commerce industrial classification manual, is that right?

A No, I asked an assistant to very briefly tell me, for example, if propane was one of them, which led me, say, to look into refrigerant. I did not look into the manual or see exactly what was in it.

Q You asked an assistant to see if it was in the Census manual?

A I asked to check officially and I was told it was in the 2813 code.

Q I notice, Mr. Dempster, in the Red Herring of Liquid Air of North American there is included in the category of industrial gasses, fuel gasses. Would you agree fuel gasses can be classified as industrial gasses?

A It depends on who makes the definition.

MR. THURMAN: Objection. He is using a document not in evidence.

JUDGE BARNES: He can use it.

MR. THURMAN: He can ask questions pertaining to it.

By Mr. Kaplan:

Q Would you agree fuel gasses can be classified as industrial

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gasses? I did not hear your answer.

A For me personally, certainly.

Q Do you have some criteria that you personally apply in deciding what is and what is not an industrial gas?

A No. Basically the business, as I know it, and as we are involved in it, is basically the heavy investment in air separation plants. If in the package of gasses you can market a profitability, you are going to do so through welding supplies -- hell, we sell hats and we have a place selling milk. If we can make a buck, we will do it.

MR. TOPKIS: Now we know what the industrial gas business is.

MR. THURMAN: Your Honor, I move that remark be stricken.

JUDGE BARNES: The remark of counsel will be stricken from the record, Mr. Topkis.

MR. TOPKIS: I apologize, Your Honor.

By Mr. Kaplan:

Q Mr. Dempster, what is the present state of competition in the industrial gasses business in the United States? Is it very competitive in your experience?

A I would say extremely so.

MR. THURMAN: Objection, no definition of "competition." It is the form of the question.

JUDGE BARNES: Rephrase your question to satisfy Mr.

Thurman.

By Mr. Kaplan:

Q Is there vigorous price competition between industrial gas companies in the United States in the sale of industrial gasses?

MR. THURMAN: Objection to the form of the question.

JUDGE BARNES: Are you objecting to "vigorous"?

MR. THURMAN: Yes.

JUDGE BARNES: Do you know what "vigorous" means?

THE WITNESS: High enough to make a profit.

JUDGE BARNES: You can answer the question.

THE WITNESS: I would say the competition is very severe.

By Mr. Kaplan:

Q Would you say there is competition among the industrial gas companies in the United States in providing service to customers?

A Yes, sir.

Q How would you characterize the state of that competition?

A It is very strong.

Q Is there competition among industrial gas companies in the United States in research and development?

A I would believe so -- yes, I would believe so.

Q How would you characterize that competition?

A I really could not comment.

Q I believe you testified earlier that beginning about a year ago some shortages in industrial gasses -- and I believe you mentioned air separation gasses in particular -- began to develop in part of the United States, is that correct?

A Right.

Q Prior to that May 1973 date, there were, in fact, surpluses of air separation gasses in the United States, were there not?

A Right.

Q And there had been for some time, is that correct?

A Right, but you have to probably define it. Sometimes it is in a pocket area, but in general terms you are right.

Q That is true also of the current shortage, isn't it? There are pockets where there are shortages of air separation gasses today and pockets where there is not, is that right?

A That's right, and I think the shortage in our industry can be compared to the shortages we have in a lot of materials today at the moment.

Q In any event, the shortages have occurred in recent months on a sporadic basis in terms of geographical area, is that correct, they exist some places and not others?

A In recent months -- it probably began early last year.

Q In fact, there has been some construction of new air separation plants both completed and announced within the last year, is that correct?

A Right.

Q In fact, Liquid Air has just completed a plant in Seattle, isn't that correct?

A That is correct.

Q And you have an announced air separation plant in the Carolinas, is that correct?

A Yes.

Q What is the oxygen capacity of the South Carolina plant scheduled to be?

JUDGE BARNES: Is that confidential information?

THE WITNESS: Yes, that is confidential information.

By Mr. Kaplan:

Q I can't hear you.

A We have not published that information.

Q We will not press that then.

You are aware, are you not, of announcements by competitors of new air separation plants?

A Yes, many of them are not in our particular area, so I do not pay that much attention, but there has been a number as I recall.

Q To sum it up, is it accurate to say the companies competing in the industrial gasses business today in the United States are competing to fill the shortage of supply at the current time, is that right?

A Yes, sir, very much so.

Q Do you have any reason to think the companies in the market today don't have the capability of meeting that shortage?

A No.

I would like to qualify that. We had quite a long list. I would say the capabilities rest mainly with the larger ones.

Q But the larger ones at least can fill whatever shortages exist today?

A Yes.

Q And are moving to do so?

A Right.

Q From your observation?

A Right.

Q You testified earlier about the acquisition of American Cryogenics by Liquid Air. Prior to the making of that acquisition, did you have some estimate of what the liquidation value of the American Cryogenics business was, that is, the value of the business sold on the auction block?

A I would have to say that we had no estimate based on any type of evaluation whatsoever inasmuch as we never saw one piece of equipment or visited one plant prior to making this acquisition and, therefore, we made a wild guess; if worse came to worst, it could not go less than $20 million.

Q Ultimately what you paid for American Cryogenics was $6 million in promissory notes and shares of preferred stock having an aggregate cumulative par value of $19 million, is that right?

MR. THURMAN: Objection. It is a relevancy objection. It is outside the scope.

JUDGE BARNES: I will permit the answer.

THE WITNESS: Effectively that is right. It is not quite that simple.

By Mr. Kaplan:

Q The preferred stock at the time it was sold to Jersey Standard, there was no market in it, was there?

A A market ---

Q There was no public trading in the preferred?

A No.

Q There is not today?

A There is not today.

Q So there is no market value for that preferred stock either then or today?

A That is correct.

MR. THURMAN: Objection. It is outside the scope. I believe Your Honor will recall we were not allowed to proceed on the acquisition.

JUDGE BARNES: Are you trying to say he overpaid or underpaid for the company?

MR. KAPLAN: I am not going very much further at all. I am trying to demonstrate what Liquid Air paid for the company at the outside was not much more than they could have sold it for on the auction block. Mr. Thurman was trying to establish a motive for that entry and that seems to be a good one.

MR. THURMAN: I think counsel misunderstood my motive.

JUDGE BARNES: He has about exhausted this subject matter.

THE WITNESS: Maybe in today's world that estimate of $20 million, what we know today, I don't know if that would be true, so what you are saying, you are making a lot of suppositions here.

By Mr. Kaplan:

Q Correct me if I am wrong, but I believe the supposition as to the liquidation value was made by you, not me.

A Based on the working paper you saw written in ? Loren ? Shanlake in 1968.

Q That was the best of Liquid Air's information at that time?

A Sure.

Q That was the information you had when you made your agreement with Jersey Standard, correct?

A That is correct.

Q I think you testified on direct that in 1973 you thought that BOC had the financial capability, the technological ability and the marketing expertise necessary to enter the U. S. industrial gasses field; is that correct?

A Yes.

Q There were certainly other foreign industrial gas producers as to whom you could make the same statement, isn't that so?

A Certainly, I guess.

Q Which ones would they be, sir?

A I would say Messer in Germany.

Q Messer Greisheim of Germany?

A Yes.

Q What about AGA of Sweden? Do they have the technical ability, the technological and marketing expertise ---

A I am not familiar with that organization.

Q There is a multitude of companies that have the financial resources necessary to enter the American industrial gasses field, isn't that so?

A Right.

Q As a matter of fact, the financial resources that were necessary in your case, Liquid Air's case, consisted of $6 million of notes and $19 million worth of stock?

A Yes.

Q As far as technology is concerned, there are certainly a multitude of companies that possess the technological ability to manufacture industrial gasses, is that correct?

A Certainly. You can buy a plant.

Q Indeed a number of American -- that is, United States -- steel companies have bought and operate air separation plants, isn't that true?

A True.

Q A number of American chemical companies have done the same thing, have they not?

A Correct.

Q There are a number of American chemical companies engaged in the production of acetylene today, is that right?

A I am not too familiar, but I think there are chemical acetylene plants being sold for the welding supply business.

Q And the same can be said for petroleum companies in the United States?

A Doing what?

Q Manufacturing acetylene today?

A Right.

Q And there are a number of companies in the chemical and petroleum industries that manufacture carbon dioxide in the United States today, is that right?

A Yes. That is usually the source of supply today.

Q In other words, those companies sell carbon dioxide to companies presently in the industrial gasses business today?

A Correct.

Q Those companies, of course -- there are also a number of chemical and petroleum companies that manufacture hydrogen in the United States today, is that right?

A Right.

Q There are also a number of petroleum companies which manufacture or produce and sell helium in the United States today?

A Yes.

Q By and large, these companies have the financial resources to produce and sell industrial gasses in the United States, is that right?

MR. THURMAN: Your Honor, we will stipulate these companies produce for their own use, but do not sell on the open market.

MR. KAPLAN: The witness has just testified some sell carbon dioxide and helium.

THE WITNESS: As a raw material, yes.

By Mr. Kaplan:

Q You also responded to Mr. Thurman that BOC has the marketing expertise to sell industrial gasses in the United States?

A I assume they have. I don't know.

Q You assume they have?

A I assume they have.

Q As a matter of fact, would it not be possible for any company with adequate financing to hire marketing expertise in the industrial gasses field?

A I would say that is feasible, yes.

Q You have been aware for some time, I gather, that BOC, Messer Greisheim and Linde of Germany have had the financial, technological and marketing expertise necessary to enter the U. S. industrial gasses field; is that correct?

A That is correct.

Q You have been aware that numerous steel, chemical and petroleum companies have had the technological and financial ability to do the same thing, is that right?

A I would not put the chemical and fuel companies in the same boat because you are talking about countries where their plants are and you do not transport our product more than 200 or 300 miles, so you are talking about a pocket-type of operation.

Q The fact is the steel, petroleum and chemical companies that operate air separation plants know how to do that, correct?

A They know how to manufacture the gas.

Q And there are numerous suppliers of air separation plants from whom they could purchase plants if they were so inclined, is that right?

MR. THURMAN: Objection to the form of the question.

By Mr. Kaplan:

Q Air Liquide will sell to all comers?

A That's right.

Q In your experience other industrial gas companies have sold other separation gas plants to other companies?

A For on-site operational work, yes.

Q By purchasing a plant, any of the petroleum, steel, chemical and perhaps other companies who have operated such plants in the plant could manufacture industrial gasses in the United States, if they were so inclined?

A They could do so if they had the on-site requirement.

Q They could do so for sale if they were so inclined?

A They could, if the market area in which their plants are would allow them to operate.

Q You have been aware of that fact for a number of years, is that true?

A Right.

Q You have been aware of the fact that any of these companies would have hired industrial expertise in this field for a number of years, is that correct?

A That is correct.

Q In these years of awareness of the ability of British Oxygen, Messer, Linde, and any number of U. S. companies to enter the industrial gasses field in the United States ---

MR. THURMAN: Objection to the form of the question.

JUDGE BARNES: What is the objection to the form of the question?

MR. THURMAN: Characterization of "in the industry."

JUDGE BARNES: Would you rephrase your question, Mr. Kaplan?

By Mr. Kaplan:

Q In the year since you have been aware of the ability of various companies to enter the U. S. industrial gasses field, you have made decisions for Liquid Air or participated in such decisions to raise or lower prices of industrial gasses, have you not?

MR. THURMAN: Objection to the form of the question.

JUDGE BARNES: I will overrule the question.

MR. THURMAN: Your Honor, he only stated he knew of one company looking around. The form of the question was "various companies." All of these people are going to enter.

JUDGE BARNES: He said British Oxygen and Messer.

MR. THURMAN: Messer was not looking around.

MR. KAPLAN: Let me restate the question. The witness testified numerous companies had the capability to answer.

Mr. Thurman, please let me finish.

MR. THURMAN: I didn't say a word.

By Mr. Kaplan:

Q During the years in which you have known of the capability of British Oxygen, Messer, Linde of Germany and other American companies to embark on the production and sale of industrial gas in the United States, you have made the decision to raise or lower prices for liquid air?

A Not in that regard at all, because there was never any threat at any point.

MR. THURMAN: Objection.

JUDGE BARNES: Your objection is overruled.

THE WITNESS: We were never involved in any location where there was any threat that entered our minds.

By Mr. Kaplan:

Q I think you anticipated me. You never regarded the possibility of entering the U. S. industrial gasses field by companies not presently in it as a threat to Liquid Air, is that correct?

JUDGE BARNES: Let's make that question "prior to December of 1973."

THE WITNESS: I got all the threats I need now. It does not make any difference if there is one more in terms of not sleeping at night. As I said, we are not in the Northeast area, so if British Oxygen wanted to work with Burdett and be very busy straightening up that company, they would not be bothering us for quite a while.

By Mr. Kaplan:

Q So the possibility of entry by another firm to the U. S. gasses business has never affected any pricing decision which you made on behalf of Liquid Air?

A No, it has not affected it.

Q The same would be true, would it not, for decisions on the construction or decision of not to construct additional capacity, would it not?

A That is correct.

Q The same would be true about marketing decisions within the United States generally, is that right?

A That's right.

Q The same would be true about decisions that you made regarding research and development efforts of Liquid Air, is that right?

A That's right.

MR. KAPLAN: If I may have just a second, Your Honor.

Your Honor, no further questions.

MR. THURMAN: May we have one minute?

MR. WADE: I do have a question or two.

By Mr. Wade:

Q Mr. Dempster, did you testify that your production or sale or carbon dioxide stated as a percentage of your total sales was rather small; is that correct?

A Yes.

Q Is that a refrigerant gas as you used the term earlier?

A No, CO_2 as such.

Q What other gasses would you include as a refrigerant gas, if any?

A In the Northwest area we have a very small operation of a freon type. Maybe I should not use that terminology. Westron is what it is called. I am talking less than $100,000. It is very, very small.

Q There are companies in the United States who produce and sell far more carbon dioxide as a percentage of their industrial sales of gasses as you have used the term, is that right?

A Yes.

Q I take it that oxygen, nitrogen, hydrogen, helium and other industrial gasses, atmospheric and otherwise, have different end uses and, therefore, different customers for the basic core of their individual sales; is that correct?

A Yes and no. You could have one customer using all these gasses, but the end uses are different.

Q I take it also that the introduction of the basic oxygen furnace in steel-making increased the demand for oxygen, is that correct?

A Right.

Q It did not necessarily increase the demand for other products, is that correct?

A That's right.

Q Therefore, when you gave a figure of 10 percent as a long-term growth rate for industrial gasses throughout the United States, was that an overall figure?

A I said 8 to 10.

Q I understand that, but is that figure covering the broad range of what somebody might term industrial gasses?

A Surely.

Q And it might vary from one industrial gas to another?

A Yes, it would, very much so.

Q That is 10 percent, a statement in terms of volume or dollars?

A I would say it is in terms of volume.

Q Mr. Dempster, are you aware of any United States companies not now in the industrial gas marketing business that conducted studies internally or by hiring consultants of the industrial gas business to determine whether they would go into that production and sale of one or more industrial gasses, and I will say 1967 through 1973 as a time period?

A Within my experience it has not come to my attention. I am not familiar with that. It would not surprise me, but I could not recollect the name of anybody who has done so.

Q Do you market atmospheric gasses which are produced in air separation units in the States of New York or Connecticut or Pennsylvania?

A No.

Q You do not?

A No, we do not.

Q How about Ohio?

A Yes.

Q Where do you market those in Ohio? Do you purchase them or produce them?

A We purchase.

Q You purchase them?

A We purchase them, yes. Our sales in Ohio would be very, very small.

Q Have you had an air separation unit in Hamilton, Ontario or has Canadian Liquid Air?

A They have, yes.

Q What percentage of the output of that plant is sold in the United States, if you know?

A Very, very small, but I couldn't tell you.

Q Did your company or any of its affiliates make any bid to purchase Liquid Carbonic Corporation from General Dynamics Corporation?

A Making a bid, no.

Q Did you ever express an interest?

A Yes.

Q When did that occur?

A I was not directly involved. I am not sure if it was late '66 or in 1967.

Q Of course, your company did not purchase it or any stock in Liquid Carbonic?

A That's right.

Q Do you know who else bid on Liquid Carbonic -- when it was sold by General Dynamics?

A I frankly do not.

MR. WADE: I have no further questions, Your Honor.

XXX

REDIRECT EXAMINATION

By Mr. Thurman:

Q Mr. Dempster, was it your marketing expertise in the industrial gasses market that turned American Cryogenics around?

MR. TOPKIS: I didn't hear any of that.

JUDGE BARNES: Read the question.

(The reporter read the question.)

MR. TOPKIS: We would say there was a substantial contribution made by Mr. Dempster.

MR. WADE: We would so stipulate.

By Mr. Thurman:

Q Mr. Dempster, since this is a growth industry, referring to the industrial gasses market in the United States, in your judgment is it conceivable that firms in the industry will find it necessary to regularly expand its production capacities?

MR. TOPKIS: Objection. We are back on direct. I have not heard a more leading question on cross.

THE WITNESS: I mean if you ---

JUDGE BARNES: Just a moment.

I believe on cross-examination Mr. Kaplan did go into who was building new plants and what areas, so I will permit this on redirect. Do you recall the question, Mr. Dempster?

THE WITNESS: You were asking do I see additional expansion due to the growth of the market and such. You can do it by arithmetic. If there is so much capacity in tons per day and you are growing at a certain rate, you could pretty well figure out the additional tonnage required. Then the question is where it is going to be, but there definitely has to be an increase in production capacity.

MR. THURMAN: We have no further questions, Your Honor.

MR. KAPLAN: No recross, Your Honor. Thank you, Mr. Dempster.

MR. WADE: I have nothing further, Your Honor.

JUDGE BARNES: Do you sell industrial gasses to distributors?

THE WITNESS: We do.

JUDGE BARNES: Have you purchased any ownership of any distributors since you have been in the U. S. market?

THE WITNESS: The answer is "no."

JUDGE BARNES: What percentage of your sales of industrial gasses in the year 1973 were to distributors?

THE WITNESS: I would give you a rough estimate. It would be of the order of 15 percent.

MR. WADE: How much?

THE WITNESS: 15 percent on a dollar basis.

JUDGE BARNES: You stated you did not consider potential market entrants in pricing. What are your major considerations in pricing, in setting your prices?

THE WITNESS: What are our major considerations? Setting prices?

JUDGE BARNES: Yes.

THE WITNESS: We trie to look at the market area of the plant where we are located, but not being the price leader, it is a question of more or less deciding which business we could not supply at a profitable price, our own costs and distribution costs within the plant market area where we operate.

JUDGE BARNES: Are there any other questions?

MR. THURMAN: No further questions, Your Honor.

MR. KAPLAN: No, Your Honor.

JUDGE BARNES: Thank you, Mr. Dempster.

(Witness excused.)

JUDGE BARNES: Shall we adjourn now and come back at

1:30?

MR. THURMAN: Fine, Your Honor.

(Whereupon, at 11:45 a.m. the hearing recessed, to reconvene at 1:30 p.m. of the same day.)

AFTERNOON SESSION

1:30 p.m.

JUDGE BARNES: On the record.

MR. PURCELL: Complaint counsel calls Michael Loveman to the stand.

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S. MICHAEL LOVEMAN was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

MR. PURCELL: Your Honor, Mr. Loveman is represented by counsel and he would like to make an appearance.

MR. BAND: I am Jordan C. Band of the law firm of Ulmer, Berne, Laronge, Glickman & Curtis.

DIRECT EXAMINATION

By Mr. Purcell:

Q Please state your name and address.

A S. Michael Loveman, 18900 South Park Boulevard, Shaker Heights, Ohio.

Q What company are you employed with?

A Burdette Oxygen Company of Cleveland, Inc.

Q In what capacity are you employed by that company?

A President and Chief Executive Officer.

Q How long have you held that position?

A The presidential title I have held since 1963. The Chief Executive Officer title, for the last four or five years.

Q What are your duties and responsibilities?

A The buck stops here. That is the best way I can give it to you. I would say complete and total responsibility.

Q Have you held any other positions with that company?

A Yes, I have.

Q Could you detail your experience?

A I started with the company in 1955 and have been in various capacities, administration, sales, marketing, operations, etcetera, financial involvement. The only other officer title that I had was vice president in charge of administration, which was approximately 15 years ago.

Q Is your company divided into divisions?

A Yes.

Q What are those divisions?

A We have an Industrial Gases and Equipment Division. We have a medical equipment division, and we have a wholly-owned subsidiary which is in the specialty gas business.

Q What products are produced by the Industrial Gases Division?

A Industrial Gases produces oxygen, nitrogen, argon, acetylene and hydrogen.

Q Are there any gas products not produced by your company which are sold through this division?

A Yes.

Q Could you identify those gases?

A They would be products such as carbon dioxide and helium. Those are principally the other gases we handle, but don't manufacture in the industrial classification.

Q Are you familiar with the term "industrial gases?"

A Yes.

Q Could you explain what your understanding of that term is?

A Industrial gases would be those gases applicable to some type of non-medical application. We would draw the distinction where we would get into the medical gas business.

Q Are all of these gases sold to distributors of your company?

A Yes.

Q Are all of these gases sold to direct customers of your company?

A Yes.

Q During the calendar year 1972, what were the net sales of industrial gases of your company?

A Approximately $12 million to $13 million.

Q During 1972, were there other companies in the United States that manufactured industrial gases?

A Yes.

Q Can you identify those companies?

MR. TOPKIS: Is this question manufactured?

MR. PURCELL: Yes.

By Mr. Purcell:

Q Industrial gases produced and distributed in the United States?

A To the best of my knowledge, Pacific Oxygen Company, Dye Oxygen Company, Gulf Oxygen, Alabama Oxygen, National Welders Supply, Northern Gases, Burdette Oxygen Company of Norristown and Syracuse; Liquid Air, Inc, not known as Liquid Air at that time; National Cylinder Gas Division, Liquid Carbonic Division of Houston Natural Gas, Air Products and Ehemicals; Airco, Inc.; the Linde Division of Union Carbide.

I may have missed one or two.

Q Selox?

A Yes.

Q Was Southern Cryogenics?

A In the sense of carbon dioxide, yes.

Q Was Big Three Industries?

A Yes.

Q Mr. Loveman, I would like to go back to the sales figures if I might.

Did you include any medical gas sales?

A No.

Q Approximately what were your medical gas sales during 1972?

A I am taking ten-month figures because we are on a fiscal February 28 schedule. So for ten months for calendar 1972 our sales must have been approximately $2 million to $3 million.

Q Mr. Loveman, could you state for the record what the fiscal year is?

A Our fiscal year ends February 28 or 29, as the year might fall.

Q Mr. Loveman, could you give us an approximate figure for calendar year 1972 for your medical gas sales?

A I would say approximately $2 million.

Q Going back to which companies manufacture and distribute industrial gases in the United States during calendar year 1972, do you have an opinion as to the four largest companies who manufactured and distributed industrial gases in the United States?

A Yes.

MR. TOPKIS: Objection on the ground this witness is not the best evidence of what the complaint counsel are seeking to bring out.

JUDGE BARNES: Mr. Purcell, you have the actual sales figures. What is Mr. Loveman's estimate going to add to it?

By Mr. Purcell:

Q Mr. Loveman, in what area of the country does your company do business?

A In the mid-west, primarily.

Q Who are your four largest competitors in that area?

MR. TOPKIS: Objection.

JUDGE BARNES: Mr. Loveman's testimony may be the best testimony of his competitors in his area.

MR. TOPKIS: The Commission is not asserting any such market, so I submit it is irrelevant.

JUDGE BARNES: That is true. Proceed, Mr. Purcell.

MR. PURCELL: Your Honor, may we have a one-minute recess?

(A brief recess was taken.)

MR. PURCELL: Thank you, Your Honor.

By Mr. Purcell:

Q Going back to the sales figure for just a moment ---

MR. TOPKIS: May I request through Your Honor that Mr. Purcell keep his voice up. I can't hear him.

By Mr. Purcell:

Q Going back to the sales figure again for just a moment, could you estimate your industrial gas sales for the calendar year 1972?

A Our total industrial gas sales?

Q Yes.

A Somewhere between $12 and $13 million.

Q Mr. Loveman, does your company belong to any trade association dealing with the manufacture of industrial gas?

A Yes, we do.

Q Could you identify those trade associations?

A We belong to the Compressed Gas Association and we belong to the International Oxygen Manufacturers Association.

Q Mr. Loveman, in your business judgment, what problems would you consider on entering an area in the country where your company is not doing business?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: What is the basis?

MR. TOPKIS: The question is formless. It calls for every problem, from the fact Mr. Loveman does not want to leave home, on.

JUDGE BARNES: What is the purpose of the question?

MR. PURCELL: I will rephrase it.

By Mr. Purcell:

Q Has your company built any air separation plants during the last three years?

A During the last three years, no.

Q Was any air separation plant built for your company during the last three or four years?

A No.

Q Do you have a manufacturing facility in Illinois?

A Yes.

Q Could you identify the name of that plant?

A It is located in Morse, Illinois, which is right near Joliet.

Q What problems did you consider when your company built the plant at Joliet?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: What problems did he encounter?

By Mr. Purcell:

Q What problems did you encounter?

MR. TOPKIS: Could we have the time established?

By Mr. Purcell:

Q When was your plant built?

A Between 1968 and 1969.

Q What is the capacity, daily capacity of that plant?

A It is rated as a 500 ton oxygen plant?

Q What problems did your company encounter when it built that plant?

MR. TOPKIS: Again, problems with labor unions, problems with competitors, problems with subsoil underlay or what?

MR. PURCELL: Your Honor, I believe Mr. Loveman is familiar with the problems that his company encountered.

JUDGE BARNES: I am sure he is, but what is the purpose of adducing this evidence? Do you want to show difficulties entering the market?

MR. PURCELL: Yes.

THE WITNESS: What difficulties did we encounter at that time?

By Mr. Purcell:

Q That is right.

A It was not a matter of difficulty in the marketplace. It was a problem with the vendor, the people who built the plant itself. What we expected to buy we did not have delivered, in essence. As a result, we ran into delays and cost overruns and partial malfunction to the basic plant itself.

Those were the principal difficulties that has such a compounding effect that it affected our overall funancial structure as to the viability of the company. That was caused by the Joliet plant itself.

Q Was any consideration given to capital requirements for construction of that plant?

A Was any consideration given?

Q Yes.

A Certainly.

Q Could you explain what considerations?

MR. TOPKIS: Your Honor, in order to build a plant like that, you need money.

JUDGE BARNES: Did he have difficulty in obtaining financing?

By Mr. Purcell:

Q Did you have difficulty in obtaining capital to build that plant?

A Initially we did not. As we ran into problems and we had borrowed on a short-term basis to pay for the construction, the cost overruns and the delays caused a negative picture to our figures. So, as a result we ran into difficulties on our long-term financing.

Q Did your company encounter any problems with regard to back-up capacity?

A Back-up capacity, yes. The plant was late in coming on stream. As a result, we had a target date or contract date that we had to be on stream. The fact that we are not on stream meant we had to supply product. We were unable to do so, so oru customer went to the open market and purchased product for which at a later date he come back to us and insisted we reimburse him for the cost of that product.

Q After the plant was constructed, did you encounter any difficulties in selling all the product being produced at that particular plant?

A If your question is was all of the product sold out when we initially came on stream, the answer is certainly not; it was not.

Q Is that plant presently operating at or near full capacity?

A Yes.

Q How long did it take the plant to produce that particular product?

A Approximately three to four years?

Q Mr. Loveman, is any industrial gas presently being produced by your company and being sold in Canada?

A Yes.

MR. TOPKIS: I am not sure I understand that question.

Does the question mean produced and sold in Canado or produced by his company wherever and sold in Canada?

By Mr. Purcell:

Q Is any product being produced in the United States and being sold in Canada?

A Yes.

Q Could you identify that gas or gases?

A The product is hydrogen gas.

MR. PURCELL: Your Honor, I would like to have the witness identify two exhibits of complaint counsel, identified as CX-245 and CX-289.

By Mr. Purcell:

Q Mr. Loveman, could you identify these, please?

A Yes. Do you want me to identify what they are?

Q Yes.

A There is one dated October 9, 1970 from Mr. J. Allan Perham to myself referring to ---

MR. TOPKIS: They have stipulated to these documents. They have come from their files.

MR. PURCELL: They only stipulated to authenticity. I did not know they stipulated to content.

I would like to move these two documents be admitted in evidence in thos proceeding.

MR. TOPKIS: No objection.

JUDGE BARNES: I will receive Commission Exhibits 245 and 289 in evidence.

(The documents referred to, heretofore marked for identification as Commission Exhibits 245 and 289, were received in evidence.)

By Mr. Purcell:

Q Are you acquainted with any present or past employees of Canox and BOC?

A Yes.

Q Can you identify those employees you are acquainted with?

A As far as BOC is concerned, I am acquainted with their chairman, Mr. Leslie Smith, Mr. R.C. Hesketh-Jones, who, I believe is one of the managing directors.

I am familiar with the Canox people, J. Allan Perham, the chairman, Mr. Harold Agar who I believe was or still is in a financial capacity with Canox and Mr. Ray Dow who is the president or the managing director of Canox.

Q Are you acquainted with Mr. I. Greenfield?

A I met him one time. He was with BOC at the time I met him.

Q During 1968, were any meetings held between yourself and any of the Canox or BOC employees you have identified?

A Yes.

Q Who was present at those meetings?

A As I recall, Mr. Purcell, the only meeting that I remember was a meeting wherein Mr. Perham and Mr. Greenfield and myself were present.

Q Approximately when did it take place during 1968?

A It was in January of whatever year it was. It could have been January of 1968 or it could have been later. I am not quite sure as to the year.

Q Where did this meeting take place?

A In New York City.

Q What was discussed at the meeting?

A Mr. Greenfield was over in this country on a tour of the United States with Mr. Pornam. I believe that they were investigating several possibilities of exposure for Canox into certain areas of business in the United States, or it could have been on behalf of BOC; I am not sure which, not necessarily gases, but I think primarily in the fields, as I recall it, some of the equipment manufacturing.

It could have been in the area of manufacturing of electrodes and welding wire and areas such as this. I do not specifically recall any recollection as to gases themselves or considering discussions having to do with the manufacturing of gases.

MR. KAPLAN: Might we have that answer again?

JUDGE BARNES: Read it back, Mr. Reporter.

(The answer was read by the reporter.)

By Mr. Purcell:

Q Could the subject of industrial gases have been discussed?

MR. TOPKIS: Objection, almost anything could have been discussed. Mr. Loveland has given us his best recollection.

JUDGE BARNES: That is true.

By Mr. Purcell:

Q Mr. Loveland, during October 1970 was there any communication between yourself and Mr. J.A. Perham of Canox?

A Yes.

Q In that communication, did Mr. Perham on behalf of CAnox express any interest as to the acquisition of any of the assets of Burdett Oxygen Company?

MR. TOPKIS: Objection, Your Honor. If the communication was written, I will have no objection to it. If it was oral, that fact should be established and its contents elicited in a manner other than this misleading manner.

MR. PURCELL: Could Mr. Loveland refer to complaint counsel number ---

JUDGE BARNES: I would like to have the question read back.

(The pending question was read by the reporter.)

MR. TOPKIS: The document is in writing and I have no objection to its receipt in evidence if it has not already been received.

JUDGE BARNES: He can ask him if there was a communication. If you want to know if it was wirtten or oral, you can ask him on cross-examination. I thought the question was proper.

MR. TOPKIS: Isn't it a leading question?

JUDGE BARNES: I don't think so. Read it again.

MR. TOPKIS: I would respectfully submit the way to ask that question is if that communication was oral, what was said. That is not leading.

JUDGE BARNES: That is one way, but Mr. Loveman can answer the question yes or no.

Was there any information requested about any communication about the purchase of assets of Burdett, yes or no?

THE WITNESS: The answer is yes.

By Mr. Purcell:

Q During October, 1973, was any meeting held between yourself and any of the BOC or Canox representatives you have identified?

A Yes.

MR. TOPKIS: Excuse me, Your Honor. I don't mean to make a pest of myself, but may I ask a question on voir dire to clarify a question?

VOIR DIRE

By Mr. Topkis:

Q Was the communication to which you referred oral or written?

A Written.

MR. TOPKIS: I move to strike. His isn't the best evidence and I hold the best evidence in my hand and complaint counsel has it, too. I don't see any point to playing games this way. The record is clear.

JUDGE BARNES: It is cumulative. We have it in testimony and in the form of a letter. I did not realize at the time he was referring to the same meeting that is referred to in Exhibit 245.

MR. TOPKIS: I am afraid I did not make my objection clear and I am sorry.

MR. WADE: I would object also if this is the written communication to which there was reference. If it speaks of an acquisition, it does; if it does not, it does not.

JUDGE BARNES: We will leave the record stand as it is.

By Mr. Purcell:

Q Could you identify who was present at the October 1973 meeting?

A Yes, Mr. Dow, president or managing director of Canox, and myself.

Q During this meeting, did Mr. Dow express any interest to you about the entry of Dow into the United States market?

MR. TOPKIS: I object. It is misleading.

JUDGE BARNES: They may have said good morning, let's have lunch together. He asked was anything said about a specific subject matter, yes or no.

MR. TOPKIS: My objection is noted.

THE WITNESS: Yes. In behalf of Canox which in turn would be on behalf of BOC.

By Mr. Purcell:

Q What was said, Mr. Loveman?

A I would like to emphasize that it was a very, very innocent type statement and something which could have been just said in passing. Frankly, I did not think too much about it until it came up here as a point. But Mr. Dow was in the process of putting together a five-year plan for Canox, which is wholly owned by British Oxygen Company and thought that Canox might like to become involved in the industrial gas business in the United States within the next five years.

As part of putting together his plan, would we consider becoming a unit of Canox or BOC, as the case might be, sometime in the next five-year period of time.

My answer was certainly not today, we would not consider something like that but very possibly over the next five years. I think it was about a one or two or three-minute conversation.

Q Mr. Loveman, based on your meetings and communications with representatives of Canox, BOC, did you perceive in 1973 that British Oxygen Company might be a potential entrant in the United States industrial gas market?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: Do you have a basis?

MR. TOPKIS: Yes, if the question were, did the witness think it a possibility BOC would enter the market, in deference to Your Honor's prior rulings, I would have no objection, but I object to it coming in with these additional trappings.

JUDGE BARNES: Do you object to the word "perceive"?

MR. TOPKIS: Yes, Your Honor.

JUDGE BARNES: Can you reframe your question?

By Mr. Purcell:

Q Mr. Lovemen, did you think that British Oxygen might enter the industrial gas market?

JUDGE BARNES: In the United States.

By Mr. Purcell:

Q In the United States?

A Not until I read the papers.

JUDGE BARNES: Are you including Canox in your answer, Mr. Loveman?

THE WITNESS: Yes.

JUDGE BARNES: Do you consider Canox a part of BOC?

THE WITNESS: Yes, I believe it is a wholly-owned subsidiary.

MR. TOPKIS: Could we have your question and answer read back?

JUDGE BARNES: The question was, did he believe BOC and he said not until he read it in the paper and I asked if he included Canox within BOC and he said yes.

MR. TOPKIS: Thank you, Your Honor.

MR. THURMAN: Your Honor, we are just about through with this witness, but may we take a five-minute recess?

JUDGE BARNES: We will take a five-minute recess.

(A brief recess was taken.)

By Mr. Purcell:

Q Mr. Loveman, I think you might have misunderstood me and I would like to rephrase my question.

As a result of your meetings and communications with Canox and BOC representatives, have you ever considered British Oxygen Company might enter the United States gaseous market other than through the acquisition of Airco stock?

A Yes, it has. I misunderstood the question before in that the surprise to me was the fact that British Oxygen chose to enter the United States market through the acquisition of certain shares of Airco. That is what I was referring to before.

If it would be any surprise to me that they would be entering the market of the United States over the next five years, I would expect that they would in some connection.

Q In what ways did you expect that they might enter the market?

A I could not be specific but I would think that somehow, some way either by direct entry or through acquisition of certain companies.

MR. PURCELL: Your Honor, I would like to show the witness complaint counsel exhibit 249 for identification.

MR. TOPKIS: Is that in evidence?

MR. PURCELL: No.

By Mr. Purcell:

Q Can you identify that?

A This is a communication from Mr. Perham to myself dated October 13, 1970.

MR. PURCELL: Your Honor, I would like to move that complaint counsel exhibit 249 be admitted in evidence.

JUDGE BARNES: Is there any objection?

MR. TOPKIS: If we could have a minute, Your Honor. We have no objection.

JUDGE BARNES: Mr. Wade, do you have any objection?

MR. WADE: No, sir, other than it is hearsay. No, I guess I don't. It is signed by Mr. Loveman.

JUDGE BARNES: I will receive Commission Exhibit 249 in evidence.

(The document referred to, heretofore marked for identification as Commission Exhibit 249, was received in evidence.)

MR. PURCELL: Your Honor, I have no further questions?

JUDGE BARNES: Cross-examination.

CROSS-EXAMINATION

By Mr. Topkis:

Q Mr. Loveman, during the five-minute recess we just took, with whom did you have conversation, sir?

A Mr. Band, my counsel, Mr. Leslie Smith, Mr. Allan Perham.

Q Anyone else?

A No.

Q Did you discuss your testimony with your counsel, I take it?

A Yes.

Q Do you have a tonnage plant at Niagara Falls?

A Yes, we do.

Q How large is that plant?

A It is rated at 150 ton per day liquid plant.

Q How far is it from the Canadian border?

A I would guess perhaps 20 miles.

Q And it is from that plant, I take it, that you have on occasion delivered gases to Canada?

A No.

Q From where, sir?

A No. The nomenclature of the gases I referred specifically to hydrogen product before and hydrogen is a different manufacturing process.

Q Of course. The plant at Niagara Falls is an air separation plant.

A Yes.

Q Where do you make the hydrogen?

A Around the Detroit area.

Q How far is that from the Canadian border?

A Five or ten miles -- no, three miles.

Q You delivered that hydrogen to a Canadian customer?

A Yes.

Q How far is he from the border?

A I don't really know, but I would think under 100 miles.

Q Just one customer, sir?

A No.

Q A few?

A Yes.

Q Distributor?

A I don't care to answer that one.

Q I don't mean to pry.

Is that customer or those customers formerly customers of Canadian Liquid Air?

A I don't know.

Q You did not go after those customers in retaliation to Canadian Air picking up some of yours?

A If they are Canadian Liquid Air customers, I wouldn't even know that.

Q Do you include in your use of the term industrial gases the fuel gases?

A Yes.

Q Propane?

A Yes.

Q MAPP?

A We don't sell MAPP but that would be industrial gases, yes.

Q When you told the Court before that your net sales or your sales of industrial gases in 1972 were \$12 million to \$13 million, do you remember that testimony?

A Yes.

Q Was that \$12 million to \$13 million figure a delivered price figure or f.o.b. your plant, or what?

A Well, tell me how sales and other revenue figures are stated in an annual report. I believe it would reflect selling price, would it not?

JUDGE BARNES: Invoice price.

By Mr. Topkis:

Q And you normally sell on a given delivery.

A Not necessarily. It may be f.o.b. a different plant.

Q Sometimes you sell f.o.b. and sometimes delivered?

A Yes.

Q I suppose it is f.o.b. plant when the customer comes and gets it.

A Yes.

Q And when you sell it, you sell it at a delivered cost.

A We might well it at a delivered price or f.o.b. delivery charge on top of that.

Q In your annual report, I see no additional income item under the sales heading for delivery charges.

A How about other revenue?

Q Is it included in other revenue?

A That is correct.

Q So then you are telling me that the sales figure in your $12 to $13 million figure excludes delivery charges, right, because delivery charges are included under other revenue?

A Yes.

Q So that the sales figure that you have just given us of $12 to $13 million is an f.o.b. plant total figure?

A Not necessarily. There might be some delivery charges as part of a sales invoice on the sales invoice; therefore it would be classified as a total sales figure.

Q But typically it would be an f.o.b. plant figure with some minor plant variations?

A Typically it would be a delivered price. Typically it would be but there are exceptions.

Q Typically it would be a delivered price but there are exceptions where it is an f.o.b. price.

A Yes, and where you bill separately it would appear in other revenue.

Q So the $12 to $13 million figure reflects your invoice prices, whatever they may be?

A That is correct.

Q And they might be delivered prices and they might be f.o.b. prices?

A That is correct.

Q Without an elaborate adding machine exercise, nobody could figure out which.

A That is correct. Let's make sure we are on the same wavelength. That is for ten months of calendar 1972, because as I stated that would be 10/12 of the total for our fiscal year which ended February 28.

Q I am very grateful to you because I think the record was in a state of confusion, at least my notes were.

So your figures would be for the last ten months of 1972?

A Right.

Q The last ten months of 1972 your sales of industrial gases were $12 to $13 million?

A Yes.

Q If you added on your sales for either the first two months of 1972 or the first two months of 1973, I don't care which, I just want an annual figure, what would we have?

A Roughly another $2 to $2-1/2 million.

Q In your listing of companies which produced and distributed industrial gases, you gave us a fairly lengthy list, did include companies that produce and distribute acetylene?

A Yes, I believe they all do.

Q But you did not endeavor in your listing to list the companies which just distribute acetylene, just manufacture?

A No, I did not.

Q Let me ask you about a few other companies, sir.

Is the name of Puritan-Bennett familiar to you?

A Yes.

Q Do they make and sell industrial gases, to your knowledge?

A Yes.

Q How about ---

A Pardon me. Make and sell industrial gases -- I am note aware that they have any air separation plants. I know that they sell industrial gases, but I think it is restricted to just one territory which is in and around Kansas City.

Q How about an outfit called Gas Pro, Inc.; is that a familiar name to you?

A Yes.

Q Where do they operate?

A I believe they are in the Hawaiian Islands.

Q Do they make and sell natural gases?

A Yes.

Q How about Midwest Solvents?

A I am not familiar with that company?

Q SEC Corporation of El Paso, Texas?

A SEC?

Q Like Securities and Exchange Commission?

A Is there another name?

Q Not according to my list.

Carbonic Industries of Orlando, Florida; do you know them as a manufacturer and seller of industrial gases?

A I believe they are a manufacturer of carbon dioxide only.

Q How about Whitmore Oxygen of Salt Lake City, Utah?

A Yes.

Q Are they a manufacturer?

A I am familiar with the company, but I am not familiar with what their exact manufacturing is. I would guess that they probably have an acetylene plant.

Q Do you know Southwest Cryogenics of Houston?

A Yes.

Q Do they make and sell industrial gases?

A I believe that is restricted to carbon dioxide also.

Q Do you know DeWele Oxygen of Columbus, Ohio?

A Very well.

Q Do they make and sell industrial gases?

A They make acetylene.

Q How about Indiana Oxygen?

A I believe they make acetylene also.

Q How about George A. Angel of Witchataw, Kansas?

A Missouri.

Q Do you know Kansas Oxygen of Hutchinson, Kansas?

A Yes.

Q Do they make and sell industrial gases?

A I believe they used to. I don't think they do anymore.

Q Do you know Standard Air Company of New Jersey?

A Standard Air?

Q Yes.

A No, I do not.

Q You said according to my notes for the last ten months of 1972 your sales of medical gases were $2 to $3 million. Do you remember that testimony?

A Yes.

Q Can't you get any more precise than that for us?

A I don't recall what the figure was. I don't have the figures with me.

For definition purposes, we include medical liquid oxygen and medical gases.

Q And the liquid oxygen that you sell for medical purposes is identical to the oxygen that you sell for industrial purposes, is it not?

A That is correct.

Q You told us about a meeting that you had in January with Mr. Allan Perham and Mr. I. Greenfield. Do you remember that testimony?

A Yes.

Q That was at the Hotel Waldorf-Astoria in New York City, was it not?

A That is right.

Q It was in January, 1970; isn't that right?

A I don't recall.

Q Let me put it this way. If Mr. Perham and Mr. Greenfield testified it was 1970, would you be inclined to credit or dispute their testimony?

A I would probably credit their testimony.

Q You told us also about a conversation that you had with Mr. Dow of Canox?

A Yes.

Q You said that was a two or three-minute conversation about Canox's five-year planning.

A Yes.

MR. PURCELL: Excuse me, Your Honor. I don't believe the witness characterized the time span involved in that.

JUDGE BARNES: I believe he did.

By Mr. Topkis:

Q That conversation was at your plant, wasn't it?

A Our offices, yes.

Q Where are they?

A Cleveland, Ohio.

Q And Mr. Dow was there at your invitation, wasn't he?

A That is correct.

Q He arrived around what time, do you remember?

A Early in the morning.

Q And he left in the late afternoon?

A Yes.

Q As a matter of fact, you were good enough to take him to the subway by which he could get out to the airport; isn't that correct?

A That is right.

Q During this meeting, what topics were discussed? What was the purpose of the visit? Let me put it that way.

A The purpose of the visit was to find out what we are doing as a company on increasing revenues and/or containing costs and what Canox might be doing to see whether or not they could get any ideas or we could get any ideas to explore potential additional profit situations.

Q Would I accurately characterize the meeting if I said the purpose of it was mutual exchange of information to the both of you?

A I would say so, yes.

Q If it occurred to Mr. Dow that you might have some business procedures and techniques which would benefit his company to be aware of and if it occurred to you that Canox had some business procedures that might be of benefit to your company ---

A That is correct.

Q Was there not a reciprocal visit by people from your office to Canox's offices in which the same kind of discussion was had?

A Yes.

Q Do you remember how many people you sent up to Canox?

A We sent two people.

MR. PURCELL: Your Honor, I fail to see the relevance of this line of questioning?

JUDGE BARNES: I think he is trying to cross-examine about the meeting with Mr. Dow.

By Mr. Topkis:

Q You said that Mr. Dow said to you that Canox might possibly be interested in entering the United States sometime in the next five years?

A Yes.

Q Did he ask you in effect if he should keep you in the picture in thinking about such planning?

A Yes.

Q What was the thrust of it?

A Might we include you in our five-year planning?

Q You said to him not today, but maybe sometime?

A Correct.

Q You don't normally give away your business secrets to competitors, do you?

A We like to not make a practice of that, yes.

Q If you had viewed Mr. Dow as an actual competitor or soon to be prospective competitor, you would not have given him your business secrets?

A No.

Q And you do not think he would give you any if he had envisaged you as a business competitor?

A We were not competitors at the time nor are we today competitors except indirectly.

Q Actually, you were particularly interested, were you not, in Mr. Dow's techniques or among other things in Canox's techniques of employee appraisal.

A That is correct.

Q You asked him what techniques Canox used to appraise the performance of its employees.

A Correct.

Q It was in connection with that question or that area of your interest that you received from Mr. Dow the document that has been marked in evidence as complaint exhibit 239; isn't that correct?

A There are two separate documents in there?

Q I have only one. I mean the letter from Mr. Dow to you.

A Yes.

Q It was in connection with that interest of yours that you received this letter from Mr. Dow; right?

A Right.

Q Mr. Loveman, you know the name of the Swedish Industrial Gases Company, AGA, do you not?

A I am familiar with the name.

Q Did AGA ever make any overtures to you about acquiring your company?

A No.

Q Did you ever have any discussions with them on the subject?

A Pardon me. I believe there was an approach at one time.

Q Do you remember when that was, sir?

A Probably in the late 1960's or 1970 - 1971, something like that.

Q Could you place it in time in comparison with the date of your meeting with Mr. Perham and Mr. Greenfield? Was it before, after or about the time of that meeting?

A I don't take the individual who was doing the exploring. I did not feel that he was an authorized person to be doing the exploring so as a result I did not take it very seriously.

Q As a consequence, you don't have a precise recollection of these talks? Is that what you are telling me?

A It could have been around that time, but I can't remember exactly.

Q In any event, nothing came of these talks?

A That is right.

Q Mr. Loveman, according to a 10-K, which your company filed with the Securities and Exchange Commission under date of February 28, 1973, you were at that time in competition with approximately five national industrial gas manufacturers and their distributors, ten regionallly oriented manufacturers and their distributors, and numerous small manufacturers and distributors located throughout the country; is that statement accurate?

A Yes.

Q Do you regard the level of competition that you face as vigorous?

MR. PURCELL: Objection, Your Honor, I think the 10-K is the best evidence and that speaks for itself. If Mr. Topkis wants to refer to the document, let him put the document in evidence and let it speak for itself.

JUDGE BARNES: He used it as a basis for a question and the witness responded. I think that is proper cross-examination.

THE WITNESS: Would you rephrase your question again?

By Mr. Topkis:

Q Do you regard the level of competition with which you are faced as vigorous?

A Very much so.

MR. TOPKIS: Thank you very much, Mr. Loveman, and Your Honor.

By Mr. Wade:

Q I believe you said, Mr. Loveman, you had two organizations through which you sell gases in your parent company. You also had a subsidiary, did you not?

A Pardon me one second.

Could the gentleman identify himself?

Q My name is George Wade and I am a member of Shearman & Sterling, counsel for Airco, Inc.

I will rephrase the question.

You satated in your testimony that Burdett of Cleveland has a subsidiary?

A Yes.

Q What is the name of the subsidiary?

A Precision Gas Products.

Q What sorts of products do they sell?

A Specialty gases.

Q What do you mean by specialty gases?

A Laboratory mixtures, gases for the electronics industry for emission control testing of the automotive companies?

Q You said mixtures. Mixtures of what?

A Various types of gases.

Q Oxygen?

A Perhaps, mainly not. It is primarily in chemical specialties and hydrocarbon type derivatives. The more exotic gases in the classical industry we may not get into per se.

Q Would they be gases you consider industrial gases?

A Yes, or very high purity requirements.

Q Does your company sell nitrous oxide?

A Yes.

Q Does it sell that through its industrial gas salespeople or medical products people?

A Medical products.

MR. WADE: I don't have any further questions, thank you, sir.

MR. PURCELL: Your Honor, I have only a few questions.

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REDIRECT EXAMINATION

By Mr. Purcell:

Q Mr. Loveman, during calendar year 1972 and that would include the ten months of your fiscal year and the earlier two months, approximately what percentage of your sales were accounted for by fuel gas?

A By fuel gases?

Q By fuel gases.

A I would guesstimate 10 to 15 percent.

Q Mr. Loveman, what do you consider to be an air separation gas?

A The products, oxygen, nitrogen and argon.

Q What percentage of your sales for calendar year 1973 were accounted for by these three gases?

A I don't have those figures readily available. I don't know. They should be in the census figures that we furnished.

Q Could you give us an estimate?

A The air separation products -- gas, liquids, and so forth. I would say in the neighborhood of 45 to 55 percent.

Q Mr. Loveman, did you include acetylene as a fuel gas?

A Yes.

Q Excluding that, what percentage of your calendar 1972 sales were accounted for by other fuel gases?

A That would be propane and other synthetic type fuel gases or derivatives. It would be a very small percentage.

Q Could you give us an estimate?

A One or two percent.

Q Mr. Loveman, during cross-examination there was a reference made to a representative of AGA who contacted you. Could you identify who the representative was?

Was that man a representative of AGA?

A He worked for them, but I am not sure whether he was a bona fide representative.

By Mr. Thurman:

Q Mr. Loveman ---

JUDGE BARNES: Can Mr. Purcell complete the examination of the witness or is there some special reason you are questioning?

MR. THURMAN: He can if he desires. I wanted to elicit a point from the witness.

JUDGE BARNES: I would prever Mr. Purcell complete the examination.

By Mr. Purcell:

Q Mr. Loveman, I would like to go back to the October 1973 meeting for just a minute.

You have testified that Mr. Dow indicated to you that Canadian Oxygen Company was considering entering the industrial gases market in the United States perhaps within the next five years; is that correct?

A That is correct.

Q As a result of this conversation with Mr. Dow, did you consider that during the next five years Canox would enter the United States industrial gases market?

A Canox themselves?

Q As a subsidiary of BOC?

A I would think that whatever might be done would be done through their North American arm. I don't know if Canox would be the acquirer or British Oxygen themselves.

Q Did you believe that Canox or British Oxygen company would enter the market?

A Yes, I would think sometime in the next five years.

RECROSS-EXAMINATION

By Mr. Topkis:

Q You told us about a man from AGA approaching you.

A Right.

Q I gather you were skeptical whether he was interested in buying our company or just trying to get information.

A That, and also it was at a very opportune time that he made the approach.

Q Did that not suggest the real purpose of his talk was to get information rather than buying. It happens from time to time people come around seeking information and you need not necessarily accept as full credit the stories they give while they are there.

A   That is right.

Q   You visited the Canox plant yourself?

A   Yes.

Q   You have seen their air separation unit?

A   It has been several years ago.

Q   Do you recall the size?

A   About a $25,000 plant.

Q   That is the only one they have to your knowledge; is that right?

A   It is the only one I saw in recent years.

Q   You make efforts to keep up your industry, do you not?

A   We are not in the Canadian market, so we don't want to get up in that.

Q   Don't you sell gas to Canox?

A   We do not sell directly. In answer to your question, we do wholesale some product Canox at Niagara Falls on an HEW plant basis.

Q   On occasions, have not personnel attempted to purchase air separation gases from you?

A   Yes, and we do sell them.

Q   Is it known to you that Canox is in a constant position of decreasing supply of gas?

A   At one time I knew that was the case.

Q   You have not sold them any?

A   I don't know.

Q Perhaps an approach might have been made at a slightly lower amount; is that correct?

A That is right.

MR. TOPKIS: Thank you very much, Mr. Loveman.

MR. WADE: Could I have about a minute?

No further questions.

MR. PURCELL: I have no further questions.

JUDGE BARNES: Thank you very much for your testimony.

(Witness excused.)

JUDGE BARNES: I suggest we take a five-minute recess and then work on documents for about an hour.

(A brief recess was taken.)

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JUDGE BARNES: Mr. Wade, what were the exhibits you wanted received in Camera?

MR. WADE: CX-267 and 268.

JUDGE BARNES: For what period?

MR. WADE: For four years, Your Honor.

MR. TOPKIS: Shall we proceed?

JUDGE BARNES: Yes.

MR. TOPKIS: Of the exhibits which have been received todate the only one for which we would ask in Camera treatment is Commission Exhibit 76. We would request that it be held in Camera for a period of three years. The reason is that it contains projections of profits and the like.

JUDGE BARNES: I believe I have already received in evidence Commission Exhibits 76, 77 and 78. I indicated yesterday that 77 and 78 would be received in Camera. So, I will reiterate that Commission Exhibits 77 and 78 will be received in Camera for a period of four years from today.

I will by formal order indicate the exact time but it will be for four years. I will receive Exhibit 76 in Camera. It will be held in Camera for three years and I will indicate in an order the formal date.

(The document referred to, heretofore marked Commission's Exhibit 76 for identification, was received (in Camera) in evidence.)

JUDGE BARNES: At this time I will turn over to the reporter all of these exhibits.

Commission Exhibit 297 is rejected and complaint counsel asks that it be placed in the rejected file. I am not sure the reporter has a copy of 297.

MR. YOUNGWOOD: We have received a certified translation of the rejected exhibit. We have not yet had the opportunity to make a copy of it. We will attach a copy of the certified translation to the copy formally furnished Your Honor and the Respondents as soon as we have an opportunity to have it copied.

JUDGE BARNES: Also the reporter.

We will turn out 297 then and not turn it over to the reporter yet. Hold it until you get your official certification ready.

I take it we can start with Commission Exhibit 83.

MR. TOPKIS: If Your Honor please, before we go to those, I made some undertakings to the Court and I would like to go to those.

Your Honor, there was a problem with CX-60, and that was the second page was missing from it. We have obtained the second page and because the first page was nearly illegible and the second page almost totally so, we have prepared a transcript of both pages -- I guess transcript is the right word -- and we would suggest that it will be substituted for or at least accompany the original exhibit. Of course, my friends are very welcome to see copies of it.

MR. YOUNGWOOD: Your Honor, we would like to check it, if we may. I am sure we will have no difficulty in agreeing to that.

MR. TOPKIS: I am handing to complaint counsel a copy of page 2.

JUDGE BARNES: We will take Commission Exhibit 60 up at a little later date, Mr. Youngwood.

MR. TOPKIS: Exhibit 71, Your Honor, was also pretty illegible. We have done our best to prepare a transcription of it. Perhaps I can give complaint counsel a couple of copies of that and they can satisfy themselves similarly.

MR. YOUNGWOOD: Your Honor ---

JUDGE BARNES: Did we receive 70 in evidence?

I bleieve we have. It is the one Mr. Topkis just gave you.

MR. TOPKIS: That was 71.

JUDGE BARNES: We will take up 71 at a later date.

MR. YOUNGWOOD: Your Honor, perhaps a way of handling this would be to ask counsel for the Respondents for the documents to which they might have objection between CX No. 83. I believe we left off at 82 -- between CX-83 and CX-119. The next omitted exhibit for complaint counsel is 120.

JUDGE BARNES: We will take up 83 through 119.

MR. TOPKIS: The first one of those to which I have

-4 objection, if I may, is 88; that is to say, so far as we are concerned 83 through 87 may be received without objection.

JUDGE BARNES: Mr. Wade, do you have any objection to 83 through 87?

MR. WADE: I don't have any objection. I don't know for what purpose they are put in but I don't have any objection.

JUDGE BARNES: I will receive Commission Exhibits 83 through 87 with appropriate sub-numbers.

(The documents referred to, heretofore marked Commission Exhibits 83 through 87 for identification, were received in evidence.) XXXX

JUDGE BARNES: Your objection to 88, Mr. Topkis.

MR. TOPKIS: Yes, Your Honor, Exhibit 88 relates to the agreement between BOC and Airco which was signed on July 25, 1973. This is an opinion of counsel. By this I mean Exhibit 88 is an opinion of counsel relating to a prior draft of that agreement. I don't press the attorney-client privilege, but it seems to me any drafts which were merged into the final document, and we need not clutter up the record with drafts.

JUDGE BARNES: What is the purpose of 88, Mr. Youngwood? Does it add anything to the record?

MR. YOUNGWOOD: I am not too certain we are on the same track. This is a letter from the company secretary, Mr. Lewsley, to J. M. Williams and Peter Laister which does transmit a draft of an agreement of motions that BOC and Airco are going to enter into discussions directed toward the possibility of a merger. Where is the opinion of counsel, though?

MR. TOPKIS: Mr. Lewsley is not only corporate secretary, but a member of the bar and corporate secretary. But as I say, I don't question the attorney-client privilege.

JUDGE BARNES: Why do we need a draft if we have the final agreement in the record?

MR. YOUNGWOOD: Your Honor, we believe that this particular document helps to portray the entire situation. It helps to show the nature of negotiations from the time that Airco and BOC first considered getting together, merging and acquisition, until such time as it was actually accomplished.

I think you should bear in mind also that part of the charges that complaint counsel have made to relate to agreements between BOC and Airco. This is part of the overall picture to be shown.

MR. WADE: I would just submit the agreements speak for themselves. If they are in connection with a violation of Section 7, they are in connection with violation of Section 7; if not, they are not. That should be the end of it.

JUDGE BARNES: What does the draft letter add to the record?

ms-6

MR. YOUNGWOOD: I don't believe the agreement contains all of the points, number one, and also the transmittal memorandum discusses the steps that BOC might make for a bid with Airco with or without Airco's cooperation. This might show how they can exert a certian degree of pressure upon Airco.

JUDGE BARNES: This is not in the signing agreement?

MR. YOUNGWOOD: As to all of the terms of the draft here -- my recollection is that the terms of the draft letter do not appear, all of them, in the final agreement.

JUDGE BARNES: I will receive Exhibit 88-A through C in evidence.

XXXX

(The documents referred to, heretofore marked Commission Exhibits 88-A through 88-C inclusive for identification, were received in evidence.)

MR. TOPKIS: Before we go any further, I misspoke myself as to Exhibit 87. I would ask while I have no objection to its being received for non-hearsay purposes, I would ask that it be received only for those purposes because, Your Honor, of the date that it was prepared, July 18, 1973, the date which appears on its face, Mr. Moeller was still a consultant to BOC rather than an employee and that fact is established by CX-90, a subsequent exhibit to which we have no objection which is an extract from the minutes of the BOC from the board authorizing his hiring subsequent to that date.

ms-7

JUDGE BARNES: We received a prief report of Mr. Moeller and I will receive 87 on the same basis.

(The document referred to, heretofore marked Commission Exhibit 87 for identification, was received in evidence.)

XXXX

MR. TOPKIS: Perhaps I should caution the Court. There are two people with confusing names we are dealing with here. This document and others have been prepared by a man named M-o-e-l-l-e-r. There will be a witness testifying tomorrow named Muller. We will try to keep it straight. I thought I might just warn you.

MR. YOUNGWOOD: I might address myself to the transcription of CX-60, which was kindly furnished to complaint counsel by our friends. There is a question mark following the word "side" on the second page, the first line. I have no quarrel with the transcription except that I am not sure whether the question mark is a typographical error or whether the question mark has a meaning. I think it is conceivable it might be just a typographical error.

MR. TOPKIS: It seemed to be "side" but to put people on notice we put in a question mark. If counsel reads it as "side," we are all happy.

JUDGE BARNES: Take this up off the record.

(Discussion off the record.)

MR. TOPKIS: The next one to which I have objection, Your Honor, is Exhibit 95.

MR. WADE: Your Honor, the next one to which I have an objection is 89 which appears to be some advice that someone received in London concerning possible acquisition of the U.S. corporation at the time just before the July 25 meeting and agreement. I object to the truth of it on the ground that it is totally hearsay as to Airco and basically irrelevant.

What BOC did during the next six months in connection with closer association with Airco will be in the record. We don't need this document to help us understand that.

MR. YOUNGWOOD: Your Honor, document CX-89 relates to considerations which are to be given to the acquisitions of the United States corporations by prior companies or the United States subsidiaries. I think this is relevant to the realization that British Oxygen Company was considering acquisition of United States companies and that these considerations which are mentioned within this document were at least pertinent to them at that point in time.

MR. WADE: I thought that is where we were going. I must say I think this document is relatively irrelevant to that. It is a comment by a New York law firm to a bank in England which is handed lock, stock and barrel, I suppose, to somebody at BOC a couple of days before the meeting with Airco representatives last July.

As far as whether BOC considered any of these considerations I haven't the foggiest idea and this document does not help tell us.

JUDGE BARNES: I don't think this is relevant either, Mr. Youngwood -- tax advice that might have come to BOC's attention.

MR. YOUNGWOOD: We will withdraw CX-89, Your Honor.

(The document referred to, heretofore marked Commission Exhibit CX-89 for identification, was WITHDRAWN.)

MR. TOPKIS: Your Honor, in the spirit of comity which seems to be seizing us, I will withdraw my objection to 95.

MR. WADE: I would like to ask for special treatment of CX-93, 95, 96, 97 and 98 on the ground that they contain evaluations, plans, et cetera of Airco in connection with the July meetings and otherwise and could, if in the wrong hands, could be somewhat less than useful to Airco, whether it is part of BOC, partly involved with Airco or completely independent.

JUDGE BARNES: I will receive Commission Exhibits 91 and 92 since there have been no objections to those documents.

MR. TOPKIS: Could we withhold action on CX-93. I would like to verify that our copy conforms to what Commission

-10 counsel has.

JUDGE BARNES: Is there any objection to receipt of Exhibits 93 through 98?

MR. TOPKIS: I have none.

MR. WADE: None except for the in Camera one.

MR. TOPKIS: The copy that complaint counsel and we have is not clear.

JUDGE BARNES: I will return 93 to you.

I will receive Commission Exhibit 93 in evidence.

I will receive Commission Exhibits 95, 96, 97 and 98 in Camera and for approximately a three-year period.

(The documents referred to, heretofore marked for identification as Commission Exhibits 93, 95, 96, 97 and 98, were received in evidence, Exhibits 95, 96, 97 and 98 in Camera.) XXX

JUDGE BARNES: What is the next stopping point?

MR. TOPKIS: The next one we have objection to is 119, Your Honor. If I may hand Your Honor a copy of it.

JUDGE BARNES: Do you have any objection to Commission Exhibits 99 through 118, Mr. Wade?

MR. WADE: Oddly enough and by no preconception 119 is the next one I have objection to.

JUDGE BARNES: I will receive Commission Exhibits 99 through 118 in evidence along with the appropriate subnumbers.

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(The documents referred to, heretofore marked Commission Exhibits 99 through 118 inclusive, were received in evidence.)

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MR. WADE: Your Honor, I assume my various remarks of yesterday concerning the status of Airco in this proceeding and relevance to Airco's position will carry over to today and we don't have to go through that again today.

JUDGE BARNES: I think so.

What is the objection to Commission Exhibit 119?

MR. TOPKIS: Your Honor, there is no way of telling when it was prepared. For all that appears, it might have been prepared 15 years ago. It is a check list for proposed acquisitions prepared by someone whose identity we don't know and its relevance does not appear on its face.

Apparently at some time or another Canox thought enough of possible acquisitions to prepare a check list but that is all this proves. I don't think that proves very much that is relevant to this case.

MR. WADE: It is one degree further removed from us and although we have not generally objected solely on the basis that it came from BOC and Airco, I really can't see where this is all that relevant.

MR. YOUNGWOOD: Mr. Topkis has been most solicitous in the past and he can help us again. Mr. Allan Perham is in the room. I am sure if he spoke to Mr. Perham he could

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clear this up.

JUDGE BARNES: What will you prove?

MR. WOUNDWOOD: We have just a limited means available to us to obtain a document. If we don't have a date or author on it but it comes to us from the files of the Respondent, we have just whatever it is that we received. I am sure Mr. Perham can clear this up.

JUDGE BARNES: What are you going to prove with the document in any event?

MR. YOUNGWOOD: This document is a check list for proposed acquisitions. This shows the types of circumstances that Canox will look at in order to determine whether they are going to acquire a particular company. We intend to prove that Canox and BOC are both potential entrants into the United States, whether it be by grass roots or by acquisition of a smaller company.

We would tend to prove by using this particular type of document that these are some of the aspects they were concerned with when they were looking for companies in the United States.

MR. TOPKIS: Your Honor. I can now comply with my friend's request. I have consulted with Mr. Allan Perham and he advises me about 1970 this document was submitted to him by a man who was then in Canox's employee. He was in Canox's employ for a whole month. At the end of the month he was discharged because all he produced during the month was such silly things as this check list.

MR. YOUNGWOOD: Your Honor, this silly check list was kept in their files for several years.

MR. TOPKIS: We probably have ham sandwiches in our files, too, if you look.

JUDGE BARNES: I must admit that some of these check list items are rather simply and prove little or nothing. Does the company have an organization chart? Is it maintained currently? Is a hospital or first aid department maintained?

MR. THURMAN: We can pick out the more relevant parts.

JUDGE BARNES: Point out the more relevant parts to me.

MR. THURMAN: Your Honor, I think the main part of this document, even though as silly as it may be, we think it should still go in the record to show that this acquisition was to be by BOC and they will look at people in their product market or complementary to their product market. It is not a company that is interested in extending its market or goes into a different geographic market.

They are interested in this and that is exactly what they did.

MR. TOPKIS: That is the whole point. An agency's declation in whatever form are binding upon the principal only when the authority of the principal is documented. I have been told by Mr. Perham who is here and able to testify, if we have to go through that formality, this was prepared by someone who had no business of preparing it.

MR. THURMAN: The point is they should have thrown it away. It is in their files in the regular course of business and it is in their company and it should be admitted. Then the burden shifts to him. He can say why little weight should be given this.

JUDGE BARNES: Is there anything in this document whatsoever, Mr. Thurman, that has anything to do with industrial gas? Does this show they are going to acquire an industrial gas firm or are they going to acquire General Motors? I have not seen any product mentioned in this entire document.

MR. THURMAN: Yes, Your Honor, I think it is well known that BOC and Canox are not in the business of manufacturing automobiles. When you look at CX-119-F, it talks about present competitors, descriptive competitive products, location size of plant, share of market, pricing policies, methods of distribution, reputation and financial details.

JUDGE BARNES: Of what type company?

MR. THURMAN: Present competitors. They are in the industrial gas business.

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MR. WADE: Question two says does the product line have anything to do in common with any existing divisions of BOC or Canox: This is about the same thing as having a copy of mergers and acquisitions on the shelf. I submit 99 percent of American companies have such a copy.

MR. THURMAN: This goes all along about the marketing of industrial gases.

JUDGE BARNES: If you can show me that, you might be able to spark my interest.

MR. THURMAN: I have to say again Canox is only in the industrial gas business.

MR. TOPKIS: That is not true.

MR. THURMAN: I don't know what else they are in but at least that is their big market in 1970. Certainly it is BOC's primary business. This goes along to acquiring competitors.

JUDGE BARNES: At this time I am going to reject Commission Exhibit 119-A through M on the basis of lack of relevancy. If at a later date you can point out some relevancy to me, I will reconsider on it.

(The documents referred to, heretofore marked Commission Exhibits 119-A through M inclusive, were REJECTED.)

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MR. TOPKIS: Your Honor, we have no objection to 120, 121 or 122. I do have an objection to 123.

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MR. YOUNGWOOD: Complaint counsel withdraws CX-120 --

MR. WADE: No objection to 120, 121 and 122.

MR. TOPKIS: Perhaps I misspoke myself. I have here a list of the ones I objected to and I was not focusing on the ones that had been withdrawn.

JUDGE BARNES: You had better check 120.

MR. TOPKIS: I did not consider that but I have no objection to it if complaint counsel wants it.

MR. THURMAN: We will withdraw 120 because we have a duplicate exhibit in there.

JUDGE BARNES: I will receive Commission Exhibits 121 and 122 with appropriate subnumbers.

(The documents referred to, heretofore marked Commission Exhibits 121 and 122, were received in evidence.)

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MR. THURMAN: Your Honor, going back to 119-A, I assume under our rules they automatically go in the rejected file?

JUDGE BARNES: I am not certain. If you would like to request it be placed in the rejected file, I will order it be replaced in the rejected exhibit file.

MR. THURMAN: We would like to withhold it. We may want to introduce it later with respect to relevancy.

JUDGE BARNES: Just hold on to it.

MR. TOPKIS: Would Your Honor want to hear from me

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on 123 now?

JUDGE BARNES: What are the objections to 123?

MR. TOPKIS: Your Honor, 123 is a letter from Mr. Williams of BOC to Mr. Gallagher who I believe is president or board chairman of Chemetron with reference to a possible interesting opportunity that the two companies might have in Mexico. That appears in the second sentence of the first paragraph. I think we have enough to worry about without worrying about Mexico.

MR. WADE: That was our objection.

JUDGE BARNES: Is there any statement on 123, Mr. Youngwood?

MR. YOUNGWOOD: The first paragraph of 123 refers to a visit made to Chemetron in 1970 at which time we intand to show British Oxygen Company attempted to purchase stock of Chemetron. This has reference to that particular visit made.

The next paragraph relates to an undertaking in Mexico and in the North American Continent. I think the fact that the British Oxygen Company did or might have a desire of moving into the North American Continent in a spot other than Canada might be relevant to this proceeding.

I would comment there can be no question that the meeting in January of 1970 did not refer to Mexico. The last sentence of the first paragraph makes that quite clear.

JUDGE BARNES: You are going to be able to establish the January 1970 meeting and the sources, are you not? Is that correct?

MR. YOUNGWOOD: I hope to.

JUDGE BARNES: Are you going to call a witness from Chemetron?

MR. YOUNGWOOD: We presently expect to call a witness from Chemetron at which time I hope to be able to establish that.

MR. TOPKIS: At least the six documents refer to it and discuss it.

JUDGE BARNES: I think this letter is a little vague as to what happened in January of 1970 -- variety of possibilities It is just that vague. What is a variety of possibilities? I don't think that first paragraph has any materiality.

To the extent that the letter indicates BOC might be interested in going into Mexico, I think that also may bear upon their intentions to become a worldwide producer. On that basis I will receive Commission Exhibit 123.

MR. WADE: May I have just a minute, Your Honor?

JUDGE BARNES: Yes.

MR. WADE: Your Honor, my problem with that Mexican operation is the letter seems simply to say if you, Chemetron, are in Mexico, we, BOC, have the facilities for building a cryo plant and maybe you would like to buy a cryo plant from us. That is not an issue in the case. It does not talk about any industrial gases being sold by BOC in Mexico. I obviously have no information except what is on the letter. I am just reading the letter.

JUDGE BARNES: I have difficulty really understanding the letter and what it does mean.

MR. WADE: I share that interpretation. The last paragraph seems to be if you, Chemetron, want to sell gases in Mexico that is fine, but why don't you buy a plant from us. There is no question about BOC and others selling cryo plants in other places in the world.

JUDGE BARNES: It refers to it assuring itself of independent plants.

MR. YOUNGWOOD: I read in effect this will close the Mexican frontier to competing sources. ' It does say for our own cryo plants limited. I believe the best way of determining the exact meaning of this letter is to ask Mr. Gallagher and when we have him on the stand I would intend to discuss with him any contacts he may have had with Mr. Williams on this point.

JUDGE BARNES: Reoffer 123 at a later date.

MR. TOPKIS: So far as 124 is concerned, Your Honor, I regret to say I don't have a copy with me here for Your Honor.

I now have one.

JUDGE BARNES: That is one exhibit?

MR. TOPKIS: It is one exhibit. It is in the spirit of kindness to Your Honor's eyes.

This is a report prepared by Stanford Research Institute, a distinguished business research organization which was prepared and distributed very, very widely, I believe. An awful lot of people bought copies of it just as one might buy The World Almanac or any other standard work. We had one in our file and here it is but I don't think it is admissible. I am sure we are going to hear we relied on it. There is no proof we relied on it. There is no proof anybody read it. There is no proof anybody could even lift it.

MR. WADE: It is 438 pages of Stanford's views.

JUDGE BARNES: You are going to call a witness from Stanford Research, are you not, Mr. Topkis?

MR. TOPKIS: Yes, sir.

JUDGE BARNES: Are you going to question him about the U.S. health market to 1980?

MR. TOPKIS: I would not dream of it.

MR. YOUNDWOOD: I might inquire about the costs. It is quite expensive. As I understand it, and I would be happy to be corrected, but as I understand it, this particular service and document was obtained in 1970. It was obtained at a time that BOC determined they were going to expand very substantially in the United States market for medical products

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in the two markets with which we are concerned.

In addition to that, there is in fact a discussion of companies in the markets of which we are concerned. It was kept in BOC's files. They subscribed to something which was an extreme survey. This is not something thousands of companies subscribe to and it is there because they relied on it. There could be no other reason they would have subscribed to it. They are interested in entering the market. They got this so they could make a determination as to how best to do it and who they could pick up.

JUDGE BARNES: You cannot establish that throughout this document. You would have to question BOC who ordered the report, why did you order it.

MR. YOUNDWOOD: We have documents to indicate why this was ordered.

JUDGE BARNES: Can't we get a stipulation that BOC purchased a copy of this report?

MR. TOPKIS: It is not true, Your Honor. The facts have just been communicated to me by Mr. Bosonnet who is in the back of the room.

This is part of the worldwide series of reports they put out. We subscribe to the entire range and it is expensive but we get something like Dr. Elliot's five-foot shelf of books for several thousand dollars which the service costs you.

The fact that we produce in volumes means only we were responding to a subpoena which called for information relating to the United States. If they asked for information relating to Pango Pango we would have another volume. They asked for this specifically by name.

MR. YOUNGWOOD: This is the United States. It is my understanding they have another service relating to matters outside the United States. It is curious they would have determined to subscribe to a Stanford Research survey relating to the United States when they weren't interested in entering the United States.

JUDGE BARNES: I understand BOC is in the health products market in this country and they are subsidiaries.

MR. YOUNGWOOD: This is dated June 1973. My comments as to the date are incorrect.

JUDGE BARNES: In June 1973 was not BOC in the fuel products market in the United States?

MR. YOUNDWOOD: They had a subsidiary Fraser-Sweatman, Inc. They also shared a Harris Colorific which owned a share of Harris Lake, but we intend to prove they had as their purpose establishing a force in the particular medical equipment markets which would place them, number one, in both markets.

JUDGE BARNES: Are you going to prove it through this exhibit here?

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MR. YOUNGMAN: We intend to prove that we believe this particular exhibit relates to the fact that they intended to expand their horizons just as their subscription to the United States service related to that.

It escapes me why they would ever subscribe to that service unless they wanted to come into the market.

JUDGE BARNES: They were already in the market at the time this report was written.

MR. YOUNGWOOD: I understand that but they did not buy this service as it related to their Fraser-Sweatman subsidiary.

JUDGE BARNES: This survey is hearsay. The only purpose in receiving this document would be to show that BOC subscribed to the Stanford reports. I think you should approach Mr. Topkis for some simple one page, one paragraph stipulation rather than putting this entire report in the public record.

If this goes into the record and if this is an expensive report, dockets will be running the Xerox copies for weeks supplying copies at a fraction of the cost it costs BOC to get it.

MR. YOUNGWOOD: 292 through 295, 354 through 356 and 423 through 429. I could have referred to them by complaint counsel page numbers.

MR. WADE: This tends to show exactly the proposition

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that I think Mr. Topkis and I are trying to bring to Your Honor's attention. What is on those pages, and frankly I have not read it and I don't know how good or bad it is, but it is all hearsay.

If we produced a Stanford Research witness and he says here is a report but you can't cross-examine, Your Honor will make fairly shortshrift of that position and that is essentially what Mr. Youngwood is trying to do.

JUDGE BARNES: If you wanted to offer through your Stanford Research witness the sales figures shown here, complaint counsel would be entitled to see all of the underlying data from which Stanford compiled this summary. This is strictly hearsay and it will have to be rejected on that basis.

The only basis I can see for receiving this report is that BOC subscribed to it for whatever that shows.

I suggest, therefore, a stipulation.

MR. YOUNGWOOD: We would be happy to enter into a stipulation to that effect.

JUDGE BARNES: You explore that with respondent's counsel. Meanwhile I will reject Commission Exhibit No. 124.

(The document referred to, heretofore marked Commission Exhibit 124 for identification, was REJECTED.)

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MR. TOPKIS: We have no objection to 125, 126 and 127, Your Honor.

JUDGE BARNES: Do you offer 125, 126 and 127, ms-25 Mr. Youngwood:

MR. YOUNDWOOD: Your Honor, we offer 125, 126 and 127.

JUDGE BARNES: Any objection?

MR. TOPKIS: No, sir.

MR. WADE: No objection.

JUDGE BARNES: I will receive Commission Exhibits 125, 126 and 127 with appropriate subnumbers.

(The documents referred to, heretofore marked Commission Exhibits 125 through 127 inclusive for XXXXXXX identification, were received in evidence.)

MR. TOPKIS: We do object, Your Honor, to Commission Exhibit 128 on the ground that its meaning is not apparent. Perhaps when we have a witness on the stand, either Mr. Jordan or Mr. Craig or Mr. Laister or Mr. Smith, we can have some light cast on this and understand what it is all about and whether it has anything to do with this case or not but until then I think it is just incomprehensible and should be rejected. I believe all four of those people are going to testify here.

JUDGE BARNES: For complaint counsel?

MR. TOPKIS: If not for complaint counsel, then for us. We have designated Mr. Smith, Mr. Laister and I believe my friend, Mr. Wade, has designated the other two gentlemen.

So, from some source or another we ought to be able

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to figure out what this means.

JUDGE BARNES: Mr. Youngwood, do any of your requests for admissions tell me who Mr. Giordano is?

MR. WADE: He is President of Airco and Mr. Craig is in charge of industrial ---

MR. TOPKIS: This meeting had to do with something but we can't tell as yet.

MR. WADE: That is the only problem. It had something to do with something in June of 1973.

JUDGE BARNES: Standing along this is meaningless unless you have another document referring to the meeting in London.

MR. YOUNGWOOD: Complaint counsel will withdraw Exhibit 128.

(The document referred to, heretofore marked Commission Exhibit 128 for identification, was WITHDRAWN.)

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JUDGE BARNES: Do you have another group we can receive today?

MR. TOPKIS: I have a problem with 129. If I may have a second, I will tell you our position.

Your Honor, I have no objection to 129.

JUDGE BARNES: Mr. Wade?

MR. WADE: I have no idea what it means. It does not mean anything to me, but for what it is worth, I don't have any objection.

JUDGE BARNES: I will receive Commission Exhibit 129.

(The document referred to, heretofore marked Commission Exhibit 129 for identification, was received in evidence.)

MR. TOPKIS: Commission Exhibit 130, Your Honor, I think qualifies for the title of least useful exhibit we have seen todate and that covers a lot of ground. I hand a full copy of it to Your Honor.

MR. KRULIA: Your Honor, with a problem. We could attach it to CX-131. It is described in our document list as a cover sheet for Fraser-Sweatman, Inc. products for anesthesia and it does fit together with document 131.

Receiving these loosly from Respondents we were not in a position to know which -- at what point one document ended and another document picked up. Later analysis indicated that document 130 should properly be included in document 131.

MR. TOPKIS: I am perfectly prepared to accept counsel's statement and to have the two received.

JUDGE BARNES: I will receive Commission Exhibit 130 and 131 with appropriate subnumbers.

(The documents referred to, heretofore marked Commission Exhibits 130 and 131 for identification, were received in evidence.

JUDGE BARNES: At this point I would suggest we adjourn.

MR. TOPKIS: Would Your Honor want to cover 130 to 160, one big swell group? We have no objection to any in between. That is from 131 to 160 so far as we are concerned they may all be entered.

JUDGE BARNES: Do you have any big ones?

MR. THURMAN: We withdrew 160 and 134.

MR. WADE: We have difficulty seeing what a couple of them are about but we have no objection to that whole bunch.

JUDGE BARNES: I will receive Commission Exhibits 130 through 133 with appropriate subnumbers. I will receive Commission Exhibits 135 through 159 with appropriate subnumbers.

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(The documents referred to, heretofore marked Commission Exhibits 130 through 133 inclusive and 135 through 159 inclusive for identification, were received in evidence.)

JUDGE BARNES: At that point we will adjourn for today. I take it we have two witnesses tomorrow.

MR. THURMAN: Three, Your Honor. We have the second witness scheduled at 2 o'clock. If he is here we would like to move him up a little to get to the 3 o'clock witness earlier. He has a little transportation problem getting back to Lake Charles, Louisiana.

JUDGE BARNES: Can you get in touch with him to get him here earlier?

MR. THURMAN: We will try to see if we can get in touch with him.

MR. TOPKIS: May I ask whether complaint counsel could arrange to have their Friday afternoon witnesses schedule earlier than 2 o'clock because I think they will be reached long before 2 o'clock if they are here both this Friday, next Friday and the following Friday. Indeed, if they could be fitted in any other time, that would be fine with us.

MR. THURMAN: Maybe we can finish with them in the morning.

MR. TOPKIS: You will undertake to have them ready?

MR. THURMAN: Yes, sir.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 4 p.m., the hearing was recessed, to reconvene at 9:30 a.m., Thursday, May 9, 1974.)